S. HRG. 101-621

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS REFORM ACT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 438

A BILL TO AMEND CHAPTER 96 OF TITLE 18, UNITED STATES CODE

JUNE 7, 1989

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S. 438—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS REFORM ACT

WEDNESDAY, JUNE 7, 1989

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 10:04 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Dennis DeConcini presiding.

Also present: Senators Thurmond, Metzenbaum, Grassley, Heflin, Specter, Humphrey, and Kohl.

OPENING STATEMENT OF SENATOR DeCONCINI

Senator DeConcini. The Judiciary Committee will come to order.

Today, we are going to hear testimony concerning S. 438, a bill to reform the Racketeer Influenced and Corrupt Organizations Act, or the RICO statute. The purpose of this legislation is to restore the usefulness and effectiveness of the RICO statute that existed prior to the explosion of abusive and harassing lawsuits filed in the 1980's.

The legislation will also restrict the misuse of RICO whereby it has been used to gain a competitive advantage in business or to coerce one party to take an action they are unwilling to take through legitimate means such as negotiation and bargaining.

I am a strong believer in the use of RICO, both civil and criminal, to penalize and prosecute organized crime and criminals of all kinds. I believe the effectiveness of RICO has been undercut and thwarted by the misuse of RICO by plaintiffs and their attorneys who have employed RICO to extort and literally blackmail defendants by bringing a RICO action in routine commercial disputes.

The legislation we consider today does not in any way weaken the RICO statute. Rather, by eliminating misuse of this powerful statute, today's legislation strengthens RICO's use against organized crime and white collar criminals.

The Racketeer Influenced and Corrupt Organizations statute was enacted in 1970 at a time when Congress was increasingly worried about the power and influence of organized crime. Congress had devoted much time and attention to studying the activities of organized crime syndicates and their effect on infiltrating legitimate businesses and unions. The result of these studies was the Organized Crime Control Act of 1970. Title IX of that act was RICO.

For the first decade of RICO's existence, there was little use of its civil provisions. In the 1980's, however, it has become almost a fad among attorneys and plaintiffs to throw a RICO count into any lawsuit seeking monetary damages in order to treble the damages, obtain attorneys' fees, and, perhaps most importantly, to get into Federal court.

The Judicial Conference of the United States has twice called upon Congress to substantially reform RICO. There have been numerous judicial decisions which have called upon Congress to modify the RICO statute. Most of these decisions have been in cases in which the judge felt bound by the law and by Supreme Court decisions to reach a result of allowing a RICO count to continue or to uphold a RICO award. These judges have stated that RICO is too broad and that it has become a windfall for plaintiffs.

Some of the statements by Supreme Court Justices are partially noteworthy. Justice Byron White said, "In its private civil version, RICO is evolving into something quite different from the original conception of its enactors." That was in *Sedima-S.P.R.I.* v. *Imrex Co.*

Justice Lewis Powell was quoted on RICO: "It defies rational belief, particularly in light of the legislative history, that Congress intended this far-reaching result."

Justice Thurgood Marshall also was quoted about the evils of this particular RICO statute.

Judge Anthony Kennedy, when he was on the ninth circuit, said, "A company eager to weaken an offending competitor obeys no constraints when it strikes with the sword of the Racketeer Influenced and Corrupt Organizations Act * * * It is most unlikely that Congress envisioned use of the RICO statute in a case such as the one before us, but we are required to follow where the words of the statute lead."

Chief Justice Rehnquist also was quoted: "I think the time has arrived for Congress to enact amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime," et cetera. This is in a speech he made at the Brookings Institute in April 1989.

In addition, Judge Abner Mikva, of the U.S. Court of Appeals for the District of Columbia, was a Member of Congress in 1970 and at that time warned his colleagues of the potential for abuse of the civil RICO provisions.

So it seems very clear that there is no political spectrum here, liberal or conservative, that doesn't believe, at least in the judiciary, that some changes must be made.

I believe it is clear from the record and from the urging of those judges charged with enforcing our criminal and civil laws that Congress act expeditiously to make the necessary changes in RICO.

To this end, we have made several changes in the bill from the one that was reported by the Senate Judiciary Committee last year. We have added a number of important new predicate offenses dealing with terrorism and organized crime. Because the standard by which a judge was to determine whether punitive damages were appropriate existed nowhere else in statutes or court decisions, we have adopted the punitive damage standard developed by the Supreme Court of Arizona.

In addition, we have made two changes in the controversial section of the bill dealing with its application to pending lawsuits.

First, we have expanded the definition of prior criminal convictions to include any felony conviction arising out of the same conduct on which the lawsuit is based.

Last year's bill would have limited the provisions to convictions of RICO predicate offenses. This change will give prosecutors more flexibility in charging defendants in criminal proceedings and will make clear that our intent is to penalize criminals, including white collar criminals, for their criminal acts.

The second change is to allow RICO plaintiffs in pending cases to recover reasonable litigation costs incurred in bringing a civil RICO suit. While we do intend to take away the windfall that many RICO plaintiffs are seeking to gain, we do believe it fair to make the plaintiff whole in his reliance on RICO and the way the courts have recently interpreted it.

Legislation similar to that which we are considering today has been unanimously reported by this committee, but has not been enacted. I am hopeful that today's hearings will lead to quick consideration of S. 438 by the Senate Judiciary Committee and by the full U.S. Senate.

I believe we have an excellent and balanced group of witnesses today who will give us perspective on each side of this issue, and I look forward to their testimony.

At this time, I yield to the ranking member of the Judiciary Committee, former Chairman Strom Thurmond.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Thank you, Mr. Chairman.

Today, we begin the first hearing on civil RICO reform legislation in the 101st Congress. Over the past several years, this has become an all too familiar issue around the Congress. The civil RICO reform legislation now pending is very similar to the bill we unanimously passed from this committee in the 100th Congress, but was not acted upon by the full Senate.

Regarding the need for this legislation, there is little doubt that the civil protection provisions of RICO are being abused in ordinary commercial litigation. The addition of a civil RICO claim has become a dragnet for zealous plantiffs' attorneys who fully understand the potential for treble damages, attorneys' fees, and court costs under its provisions.

Recently, I had the pleasure of participating with Chief Justice Rehnquist and others at the 11th Seminar on the Administration of Justice in Williamsburg, VA. The Chief Justice was unequivocal in his remarks that the Congress should move swiftly to limit the incentive of lawsuits filed under the civil RICO provisions. Other Federal judges have also been openly critical of civil RICO and urged reform.

It is unreasonable and naive to believe that plaintiffs' attorneys will unilaterally refrain from alleging civil RICO violations in ordinary business disputes. The U.S. Congress has a responsibility to rein in this runaway statute.

The legislative history makes clear that when the Congress passed the Racketeer Influenced Corrupt Organizations Act of 1970, we did so with the intent to thwart the infiltration of legitimate businesses by organized crime. The criminal and civil RICO provisions have proved to be an effective law enforcement tool to combat the unlawful activities of those engaged in organized crime.

Unfortunately, since the early part of this decade, we have seen a growing number of civil RICO cases being filed in our Federal courts. The overwhelming number of these cases have no business containing RICO allegations in their complaints. These lawsuits are not what the Congress envisioned when we passed RICO in 1970 to fight organized crime engaged in racketeering.

I am pleased that Senators DeConcini, Hatch, and Symms have introduced legislation to limit the civil RICO provisions to reflect our intentions that it be used to punish the organized criminal element in our society.

Generally speaking, S. 438 allows governmental plaintiffs to continue to pursue treble damage awards, while limiting other plaintiffs to actual damages unless defendants' actions were consciously malicious.

With regard to pending cases, there once again is language to permit the judge sitting in the particular case to allow continued pursuit of treble damages for a meritorious RICO claim.

I look forward to hearing from the witnesses today, and believe we can soon report this or very similar legislation to the Senate for floor action and final passage.

Mr. Chairman, I have another commitment. I am going to have to leave in about 25 minutes, and I will take pleasure in reading this report. I want to congratulate you on holding this hearing.

Senator DeConcini. Thank you, Senator Thurmond.

The Senator from Ohio, Senator Metzenbaum.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator Metzenbaum. Mr. Chairman, it is sort of deja vu. Once again, this committee is considering a proposal to amend the Racketeer Influenced and Corrupt Organizations Act. I continue to believe that RICO is in need of reform, but I also believe we must be careful not to weaken the provisions of the law which protect consumers.

Last session, I worked hard to come up with an acceptable reform of the RICO law. In fact, at one point I thought we had an agreement on the subject, and then one or two groups got off the reservation.

My bill, S. 1523, frankly, was not a perfect bill, but I thought it had the best chance of resolving this longstanding dispute and correcting some of the more abusive and unanticipated uses of the RICO statute.

I am frank to say that I took considerable criticism and abuse from some who said we shouldn't be changing the RICO law; that we were going too far in doing so. And then there were others who said we weren't going far enough.

Although that bill was voted out by the Judiciary Committee and came close to passage last session, I was not completely happy with the final version because it would have applied retroactively to pending cases and did not offer adequate protection to small investors.

This matter of retroactivity is of considerable concern to me. In the past and over the years in this body, I have opposed legislation that takes away the rights which an individual or group of individuals have in connection with a pending piece of legislation.

The chairman will recollect that we had a number of pieces of legislation having to do with taking away the rights of plaintiffs in antitrust cases. And to the best of my recollection, we were successful in keeping that from occurring and we permitted them to go forward with their litigation and indicated that the Congress would not support denying an individual or group of individuals rights which they had incurred prior to congressional action.

Now, I understand that the acting chairman has tried to add protections for those with pending cases by providing that a plaintiff with a pending case can recover the costs of the action, including reasonable attorneys' fees and litigation expenses.

My experience with the debates on retroactivity strongly suggests that applying any bill to pending cases is an invitation for controversy and is a recipe for sinking the bill. I would urge Senator DeConcini to drop the retroactivity provision if there is to be a bill passed this Congress.

I also remain concerned that there is no protection for small investors in this bill. I do not believe that the securities laws offer adequate relief to small investors who are victimized by securities fraud.

The securities laws currently only provide for actual damages for these plaintiffs. The reality of the justice system is that these people are not made whole for their losses if they can only recover, at most, their actual damages.

Every one of us in this room and anyone who is at all familiar with issues of this kind know that the legal costs are such that if you can only recover the actual damages, it is almost impossible to go to court to protect yourself because the legal costs eat up all of the possible gain that a small investor might have—not gain; I think the proper word is "recovery." So, as a consequence, a small investor must settle for considerably less than his or her actual losses rather than face the risk and expense of trial.

I believe if we are to pass legislation making the RICO law significantly less onerous to the securities industry, the least we can do is offer some protection to the small investors who most need to be able to recover multiple damages in order to be made whole from losses suffered because of security fraud. I would hope we can find a way to address this issue in the bill.

I think there was sort of an obdurateness on the part of some in the last session to keep from providing any protection for the small investors and, as a consequence, the bill did not become a reality.

In sum, while I still believe that the RICO statute is in need of reform, and I am prepared to support reform, I am not entirely happy with the bill that is before the committee. I look forward to this hearing. I hope the final bill will resolve my continuing concerns.

And I would say to the chairman that I am prepared to work with him to try to resolve these two particular sticking points that I have mentioned in my comments so that the RICO bill can move forward promptly and be passed and, without further controversy, become the law of the land.

Senator DeConcini. I thank the Senator from Ohio, and I can assure him that we will continue to work with him, as we always have. We appreciate his continued offer of settling differences and attempting to work them out. Sometimes he and I have, and sometimes we haven't, worked out our differences, and yet we have maintained the most professional relationship, as well as personal one. I am pleased to have the Senator's views on this legislation, or any other legislation, because he has a great deal to add.

The Senator from Iowa, Mr. Grassley.

OPENING STATEMENT OF SENATOR GRASSLEY

Senator Grassley. Thank you, Mr. Chairman.

We are always reminded that the RICO Act was enacted with the intent of strengthening the hands of prosecutors against organized crime. But while Congress thought it was simply getting tough with the mob—and that was a worthy goal and still is a worthy goal—things have since gotten out of hand.

The evidence is that the law has been used for purposes well beyond the original intent of Congress.

Recently, for example, some prosecutors have used criminal RICO to coerce legitimate businesses into plea bargains; some plaintiffs' lawyers have used civil RICO to virtually extort large awards from banks and accounting firms; and in actions for divorce, trespass, family inheritance, employment benefits, and sexual harassments by unions; and now even in actions against pro-life demonstrators.

If you look over that whole group I just listed, there is not a mobster in sight.

Indeed, more than 90 percent of the over 1,000 civil RICO cases that are filed annually right now involve legitimate business defendants, not organized crime.

Some estimate that these cases cost the economy many millions of dollars, and perhaps even billions of dollars, in wasted litigation expenses.

As Federal Judge Jack Weinstein recently observed upon dismissing a RICO suit, and I quote, "The only inhibition on the commencement of civil RICO is the limit on the imagination of counsel," end of quote.

More ominous, perhaps, are suits for treble damages under civil RICO that have the effect of inhibiting the free speech rights of those who want to use civil disobedience as their means of protest.

Of course, no one defends the intentional damage caused to property by protestors of any political stripe.

However, when damage to property alone can be used to establish a pattern of disruption or harm to the object of the protest, or, in the terms of the RICO statute, establish an "ongoing criminal enterprise and pattern of racketeering activity," in order to gain treble damage awards from protestor/defendants, no matter how nonviolent the intent of the protestors, then it appears that the operation of the law may be out of sync with its original intent.

When a statute such as civil RICO may be used, in effect, to chill the first amendment rights of those who are opposed to apartheid, nuclear weapons, or abortion, then it is time to revisit the operation of that statute.

That is why this committee meeting is very timely.

We all know, of course, that in 1985 the Supreme Court, in a 5-to-4 decision in the *Sedima* case, determined that Congress, and not the Supreme Court, should decide how the RICO statute is to operate.

However, in dissent, Justice Marshall warned in that case, and I quote, "Civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat."

Chief Justice Rehnquist, who, as an Associate Justice, joined the majority at that time, has now taken a second look and has written, and I quote, "I think that the time has arrived for Congress to enact amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime or have some other reason for being in Federal court."

Now, just because the Federal courts may not want to hear a certain kind of case is no reason alone for the Congress to act. However, suggestions regarding the jurisdiction of our Federal courts made by our Chief Justice are entitled to great weight.

Of course, we need to recognize the importance of enforcement statutes as tools for Federal prosecutors, State attorneys general, securities regulators, and insurance commissioners in their battle against white collar fraud and criminal schemes in military procurement contracts, the savings and loan industry, and Wall Street's insider trading scandals, among others.

And if RICO is to retain a role as such a tool, it should be within the bounds of congressional intent, not the imagination of the courts or the lawyers that practice before them.

Of course, if the intent of Congress is not clear, then we not only need to, but we have a responsibility to clarify our intentions. We are so often on this committee concerned about the overload in the Federal courts and judicial system. Part of that, to a great extent, is because we have not done a very good job of making clear what congressional intent is.

So, with those background statements in mind, I look forward to these hearings. I think that we have a problem to overcome, and probably some legitimate legislation needs to be crafted by this committee.

Senator DECONCINI. I thank the Senator from Iowa.

The Senator from Wisconsin, Mr. Kohl.

OPENING STATEMENT OF SENATOR KOHL

Senator KOHL. Thank you, Senator DeConcini. I commend you for conducting this hearing on the RICO law. Clearly, you have done an outstanding job on this important issue, and I appreciate your leadership.

I think everyone on this committee would agree that RICO has beneficial aspects. At a time when white collar crime is soaring, RICO can send a crucial message: If you commit a pattern of rip-offs, you will pay each victim not once, but three times.

This valuable message, however, is not the only one that RICO sends. It also tells lawyers, if you are going to sue a business for commercial fraud, go to Federal court and get treble damages. As a matter of policy, I don't think we should have a Federal treble damage remedy in such situations.

The question, then, is not whether RICO has been abused. Attorneys who invoke RICO in garden-variety fraud cases are probably guilty of nothing more than zealous advocacy on behalf of their clients. Similarly, the issue is not whether RICO reform is liberal or conservative. Chief Justice Rehnquist thinks the law should be so overhauled, and so does Justice Marshall.

Nor does this controversy hinge on what Congress intended for RICO to do. Congress almost certainly did not mean for RICO to reach out as broadly as it has. But while congressional intent deserves our consideration, it is essential that we focus on RICO's uses in 1989, not on Congress' goal in 1970. Thus, the key issue remains whether there should be a Federal treble damage remedy for commercial fraud and routine contract cases.

Generally speaking, I think Senator DeConcini's bill does a good job of defining who ought to be able to use RICO and in what circumstances. His legislation would permit injured persons to recover their damages and their costs, but it would reduce the incentive for plaintiffs to litigate mine-run fraud claims as violations of Federal law. Many business disputes would return to the State courts where they belong. At the same time, government would still be allowed to protect consumers by seeking treble damages.

I do have some questions about a few specific provisions in S. 438. First, I wonder if defendants who should be punished by treble damages will escape their just desserts by making deals with criminal prosecutors.

Specifically, if a defendant pleads guilty to one count in exchange for dismissal of a similar count, will people injured by the dismissed offense be allowed to sue for treble damages, and to what extent should prosecutorial discretion define a civil remedy?

Second, will the bill's affirmative defense protract RICO litigation and immunize defendants who are just lucky enough to escape the attention of regulatory agencies? Finally, is it fair to apply S. 438 retroactively? What do we say to plaintiffs who filed their cases in good faith?

I am confident, Senator DeConcini, that my questions can be addressed. Overall, RICO reform is a good idea and I am grateful to you for your efforts to make it become a reality. As a former businessman, I know that honest enterprises are sometimes sued for the flimsiest of reasons. The last thing our economy needs is a lawyer's full employment act.

Thank you.

Senator DeCONCINI. Well, right now, being a lawyer and a member of this body, I agree with you, but I am not sure I will always take that position. Thank you, Senator Kohl, very much.

The Senator from New Hampshire, Senator Humphrey.

OPENING STATEMENT OF SENATOR HUMPHREY

Senator HUMPHREY. Thank you, Mr. Chairman.

One particular aspect of the RICO abuse is especially disturbing to me, and that is that civil RICO suits are now being used to suppress and persecute the exercise of first amendment rights by American citizens.

Just last March, the U.S. Court of Appeals for the Third Circuit upheld the application of harsh RICO remedies against pro-life demonstrators who were protesting against abortion in Philadelphia. Encouraged by that decision, civil RICO suits are now being filed across the country in a conscious, concerted effort to stifle the first amendment rights of such demonstrators.

Mr. Chairman, those who protest abortion are by no means the only ones who are threatened by this abuse of the RICO statute. Professor Alan Dershowitz of the Harvard Law School, one of the Nation's preeminent liberal legal scholars, recently stated that the use of RICO against these demonstrators is, as he said, "a harebrained idea promoted by those who think the end justifies the means."

And he further pointed out, "Don't forget that if the U.S. Supreme Court were to reverse *Roe* v. *Wade,* the pro-choicers will be protesting and RICO could also be used against them."

The fact is that civil RICO can be used against antinuclear demonstrators, antiwar demonstrators, or antiapartheid demonstrators just as easily as it has been used against pro-life demonstrators, and that is why voices as diverse as those of Alan Dershowitz, the ACLU, Washington Post columnist Nat Hentoff, and the Operation Rescue pro-life organization have condemned the use of civil RICO as a weapon against freedom of expression.

Mr. Chairman, I ask unanimous consent that an article by Nat Hentoff entitled "The RICO Dragnet" from the May 13 edition of the Washington Post be included in the record.

Senator DECONCINI. Without objection, so ordered.

[The information of Senator Humphrey follows:]

THE RICO DRAGNET

(By Nat Hentoff)

Before RICO (the Racketeer Influenced and Corrupt Organizaitons law) was passed in 1970, a representative of the American Civil Liberties Union testified against it. He said the language of this harsh bill was so broad ("patterns of racketeering," for instance) that it was likely to reach far beyond its intended target, organized crime.

Indeed, he added, this newborn weapon against the mob could eventually be turned against the civil liberties of all kinds of people who are not racketeers.

And so it has come to pass. Attracted by access to federal courts on what have been state and local charges—along with, in civil cases, treble damages, attorney fees and lower standards of proof—all manner of plaintiffs have been filing RICO suits.

Texas Air, for example, aimed RICO at the pilots' and machinists' union, claiming that their public complaints about the airline's safety were part of a pattern of racketeering.

A member of a Hasidic congregation used RICO to sue other members in an argument over the successor to the "Skolyer Rebbe." FBI agents who set up a sting operation were hit with a RICO suit. A real estate development partnership with Donald Trump in charge hauled out RICO to sue the law firm representing tenants who didn't want the building to be converted to condominiums.

In 1987, another representative of the ACLU, Antonio Califa, appeared before the Senate Judiciary Committee to urge reform of RICO. "Often," he said, "the mere threat of treble damages and being labeled a 'racketeer' intimidates defendants into settlement in even the most frivolous suit."

Califa also warned that RICO was beginning to chill First Amendment rights, as in cases of protesters at abortion clinics.

One of the cases he mentioned, *Northeast Women's Center* v. *McMonagle,* has resulted in the conviction of 26 antiabortion demonstrators who have been fined $43,000 in damages and $65,000 in lawyers' fees. The third circuit affirmed, and the Supreme Court is being asked to review the case.

There is no question that some of the protesters went beyond speech and were guilty of trespass, disorderly conduct and failure to disperse—customary charges at demonstrations. But as David Boldt, editor of the Philadelphia Inquirer editorial page, has noted: "The demonstrations against the Vietnam War that I covered in the 1960s had a much higher quotient of violence, and I have crossed union picket lines that were more abusive."

The Northwest Women's Center, however, by federalizing and pumping up these charges—and penalties—through RICO, has helped create a strategy for discouraging demonstrations by antiapartheid, antinuke and civil rights groups, among others. No matter how nonviolent a protest may be in intent, some of its more intense members may well damage property and, in RICO's terms, disrupt and harm the owner's business.

In the Philadelphia case, the demonstrators were accused under RICO of engaging "in an ongoining criminal enterprise and pattern of racketeering activity." The "criminal enterprise" consisted of the defendants having formed such organizations as the Pro-Life Non-Violent Action Project of Southeastern Pennsylvania. This, according to RICO, was a conspiracy, and what flowed from it was "a pattern of racketeering activity."

I wondered why the ACLU of Pennsylvania had not at least spoken against the dangers to civil liberties of using RICO in this case, as Antonio Califa had in Washington. The legislative director, Stefan Presser, told me that the board of directors had decided on silence. "I'm not saying," Presser said, "that the debate was not influenced by who the parties were."

Since the defendants were prolifers, the prochoice ACLU board could not muster sufficient concern for what was happening to the other side under RICO. In Philadelphia, therefore, the ACLU's reason for being—constitutional liberties are indivisible—was turned upside down.

Meanwhile, Patricia Ireland, executive vice president of the National Organization for Women, rejoiced at the RICO verdict against the Philadelphia demonstrators. "A wonderful decision," this attorney said.

As the abortion wars move into state legislature—if the Supreme Court upholds more state restrictions on abortions—there are likely to be large-scale demonstrations against prolifers and legislators that may damage property and otherwise have the elements of a "conspiracy."

In 1990 or so, a prolife group can be expected to file a "wonderful" RICO suit against NOW.

Senator HUMPHREY. It appears that the bill under consideration will eliminate the worst of the civil RICO remedies in some cases involving demonstrations and other first amendment activity.

However, it appears that triple and double damage remedies will still be available in suits brought by government plaintiffs, and possibly suits brought by natural persons based on alleged injuries resulting from demonstrations.

Clearly, RICO was never intended to be used as an instrument of suppression against free expression. So I urge the chairman and the other sponsors of this bill to perfect it further to assure that the reforms are broad enough to eliminate this unacceptable, reprehensible use of civil RICO, and I am prepared to work with my colleagues toward that end.

Senator DECONCINI. I thank the Senator.

Before I call the first witness, I wish to place a statement by Senator Simpson and a copy of S. 438 in the record.

[The aforementioned follows:]

OK

STATEMENT OF SENATOR ALAN K. SIMPSON

Hearing on S. 438
Racketeer Influenced and Corrupt Organizations
Reform Act -- Senate Judiciary Committee
June 7, 1989

Mr. Chairman, I appreciate this opportunity to make a few remarks about this very important legislation. Civil RICO reform has seen "a lot of action" in both the House and the Senate in recent congresses. It may be that the 101st Congress will actually see the culmination of these efforts and the passage of much needed reform.

The House Judiciary Subcommittee on Crime has held hearings on this measure and it appears that the Subcommittee is more likely to report this legislation favorably than was the case in the last Congress. Additionally, this Committee seems likely to follow its actions from last Congress and unanimously report the measure which we have before us. I'll be interested to receive the testimony of the various witnesses to learn what improvements may be appropriate in this legislation at the time of markup.

Now is clearly the time to reform the civil RICO mess. Supreme Court Chief Justice William Rehnquist has noted that as well in several recent appearances. As recently as May 19, the Chief Justice authored an article in the Wall Street Journal entitled "Get RICO cases out of my courtroom" That title captures the sentiment of many federal judges in the country who has seen the abuse of civil RICO laws at an ever increasing rate. The RICO filings continue to grow. Many of these cases have nothing whatever to do with racketeer influenced and corrupt organizations. The law has been abused for domestic relations filings, contract cases and many other inappropriate areas of civil litigation.

Such formidable "organizations" as the Department of Justice, the ABA, and the National Association of Attorneys General have reviewed the legislation and offered useful suggestions for possible improvement. It will be important to maintain key aspects of the RICO statute which have been very useful to the Department of Justice in a criminal division in pursuing the bona fide intent of the statute. At the same time, unwarranted use of the statute by private plaintiffs must be curbed. I thank you, Mr. Chairman for this opportunity to make a few remarks and I look forward to receiving the testimony of the witnesses.

II

101st CONGRESS
1st Session

S. 438

To amend chapter 96 of title 18, United States Code.

IN THE SENATE OF THE UNITED STATES

February 23 (legislative day, January 3), 1989

Mr. DeConcini (for himself, Mr. Hatch, Mr. Heflin, and Mr. Symms) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend chapter 96 of title 18, United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as "The RICO Reform Act of 1989".

SEC. 2. ADDITION OF PREDICATE OFFENSES.

Section 1961(l) of title 18, United States Code, is amended—

(1) in subparagraph (A), by inserting "prostitution involving minors," after "extortion,";

(2) in subparagraph (B)—

(A) by striking "section 201" and inserting the following: "Section 32 (relating to destruction of aircraft or aircraft facilities), section 81 (relating to arson), section 112(a), (c)–(f), (relating to protection of foreign officials and other persons), section 115 (relating to acts against Federal officials and other persons), section 201";

(B) by inserting after "sections 471, 472, and 473 (relating to counterfeiting)", the following: "section 510 (relating to forging of Treasury or other securities), section 513 (relating to forgery of State and other securities),";

(C) by inserting after "section 664, (relating to embezzlement from pension and welfare funds)," the following: "section 878 (relating to threats and extortion),";

(D) by inserting after "section 1029 (relating to fraud and other activity in connection with access devices)," the following: "section 1030 (relating to fraud in connection with computers),";

(E) by inserting after "section 1084 (relating to the transmission of gambling information)," the following: "sections 1111, 1112, 1114, 1116, and 1117 (relating to homicide), section 1203 (relating to hostage taking),";

(F) by striking out "section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant)," and inserting in lieu thereof the following: "sections 1501–1506, 1508–1513, and 1515 (relating to obstruction of justice)";

(G) by inserting after "sections 2251–2252 (relating to sexual exploitation of minors)," the following: "section 2277 (relating to vessels),";

(H) by inserting after "sections 2314 and 2315 (relating to interstate transportation of stolen property)", the following: "section 2318 (relating to counterfeit materials)"; and

(I) by inserting after "section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts)," the following: "section 2331 (relating to terrorist acts abroad),";

(3) by striking out "or" at the end of subparagraph (D);

(4) by striking out the semicolon at the end of subparagraph (E) and inserting in lieu thereof ", (F) any offense under section 134 of the Truth in Lending Act (15 U.S.C. 1644), or (G) section 5861(b)–(k) of the Internal Revenue Code of 1986 (relating to firearms controls) (26 U.S.C. 5861(b)–(k));"

SEC. 3. BURDEN OF PROOF.

Section 1964(a) of title 18, United States Code, is amended by inserting after "of this chapter by issuing" the following: ", upon proof by a preponderance of the evidence,".

SEC. 4. CIVIL RECOVERY.

Subsection (c) of section 1964 of title 18, United States Code, is amended to read as follows:

"(c)(1)(A) A governmental entity (excluding a unit of local government other than a unit of general local government), whose business or property is injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court, a civil action therefore and, upon proof by a preponderance of the evidence, shall recover threefold the actual damages to the business or property of the governmental entity sustained by reason of such violation, and shall recover the costs of the civil action, including a reasonable attorney's fee.

"(B) A civil action under subparagraph (A) of this paragraph must be brought by—

"(i) the Attorney General, or other legal officer authorized to sue, if the injury is to the business or property of a governmental entity of the United States;

"(ii) the chief legal officer of a State, or other legal officer authorized to sue, if the injury is to the business or property of a governmental entity of the State;

"(iii) the chief legal officer, or other legal officer authorized to sue, of a unit of general local government of a State, if the injury is to the business or property of the unit of general local government; or

"(iv) a court-appointed trustee, if the injury is to the business or property of an enterprise for which the trustee has been appointed by a United States district court under section 1964(a) of this title.

"(2) A person whose business or property is injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court, a civil action therefore and, upon proof by a preponderance of the evidence, shall recover—

"(A) the actual damages to the person's business or property sustained by reason of such violation;

"(B) the costs of the civil action, including a reasonable attorney's fee, if the person whose business or property is injured is—

"(i) a unit of local government other than a unit of general local government; or

"(ii)(I) a natural person, or an organization meeting the definition of exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)), or an organization meeting the definition of an indenture trustee under the Trust Indenture Act of 1939 (15 U.S.C. 77jjj, et seq.), or an organization meeting the definition of a pension fund under the Employee Retirement Income Security Act (29 U.S.C. 1001, et seq.), or an organization meeting the definition of an investment company under the Investment Company Act of 1940 (15 U.S.C. 80a–1, et seq.); and

"(II) the person is injured by conduct proscribed by section 21(d)(2)(A) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)(2)(A)); or

"(iii)(I) a natural person and the injury occurred in connection with a purchase or lease, for personal or noncommercial use or investment, of a product, investment, service, or other property, or a contract for personal or noncommercial use or investment, including a deposit in a bank, thrift, credit union, or other savings institution; and

"(II) neither State nor Federal securities or commodities laws make available an express or implied remedy for the type of behavior on which the claim of the plaintiff is based; and

"(C) punitive damages up to twice the actual damages if the plaintiff may collect costs under the provisions of subparagraph (B) of this paragraph, and the plaintiff proves by clear and convincing evidence that the defendant's actions were consciously malicious, or so egregious and deliberate that malice may be implied.

In actions in which the plaintiff may collect costs under the provisions of subparagraph (2)(B)(ii) of this paragraph, the calculation of punitive damages also shall be consistent with section 21(d)(2)(C) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)(2)(C)), and the assessment of punitive damages against a person employing another person who is liable under this clause shall be consistent with section 21(d)(2)(B) of the Securities Exchange Act of 1934 (15 U.S.C. 78u(d)(2)(B)).

"(3) A natural person who suffers serious bodily injury by reason of a crime of violence that is racketeering activity and that is an element of a violation of section 1962 of this title may bring a civil action in an appropriate United States district court, and, upon proof by a preponderance of the evidence, shall recover—

"(A) the costs of the civil action, including a reasonable attorney's fee;

"(B) the actual damages to the person's business or property sustained by reason of such violation;

"(C) the actual damages sustained by the natural person by reason of such violation, as allowed under applicable State law, (excluding pain and suffering); and

"(D) if the plaintiff proves by clear and convincing evidence that the defendant's actions were consciously malicious or so egregious and deliberate that malice may be implied, punitive damages of up to twice the actual damages.

"(4) In an action under this subsection, evidence relevant only to the amount of punitive damages shall not be introduced until after a finding of liability, except the court may permit, for good cause shown and in the absence of any undue prejudice to the defendant, introduction of such evidence prior to a finding of liability on motion of a party or in the exercise of its discretion.

"(5)(A) A person whose business or property is injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court, a civil action therefore and, upon proof by a preponderance of the evidence of such violation, shall recover threefold the actual damages to the person's business or property sustained by reason of such conduct, and the costs of the civil action, including a reasonable attorney's fee, from any defendant convicted of a Federal or State offense described in subparagraph (B).

"(B) The offense referred to in subparagraph (A) must—

"(i) be based upon the same conduct upon which the plaintiff's civil action is based;

"(ii) include a showing of a State of mind as a material element of the offense; and

"(iii) be punishable by death or imprisonment for a term of more than one year.

"(6)(A) Except as provided in subparagraph (B), a civil action or proceeding under this subsection may not be commenced after the latest of—

"(i) four years after the date the cause of action accrues; or "(ii) two years after the date of the criminal conviction required for an action or proceeding under paragraph (5) of this subsection.

"(B) A civil action brought pursuant to subsection (c)(1)(B) (i), (ii), or (iii) may not be commenced more than 6 years after the date the cause of action accrues.

"(C) The period of limitation provided in subparagraphs (A) and (B) of this paragraph on a cause of action does not run during the pendency of a government civil action or proceeding or criminal case relating to the conduct upon which such cause of action is based.

"(7)(A) It shall be an affirmative defense to an action brought under this subsection that a defendant acted in good faith and in reliance upon an official, directly applicable regulatory action, approval, or interpretation of law by an authorized Federal or State agency in writing or by operation of law.

"(B) Before the commencement of full discovery on and consideration of the plaintiff's claim, the court shall determine, upon defendant's motion, the availability of any affirmative defense asserted under this paragraph. The discovery of any such affirmative defense shall be allowed, as provided by law or rule of procedure, prior to the court's determination of the availability of such an affirmative defense.

"(8) In an action under this subsection, facts supporting the claim against each defendant shall be averred with particularity.

"(9)(A) An action or proceeding under this subsection shall not abate on the death of the plaintiff or defendant, but shall survive and be enforceable by and against his estate and by and against surviving plaintiffs or defendants.

"(B) An action or proceeding under this subsection shall survive and be enforceable against a receiver in bankruptcy but only to the extent of actual damages.

"(10) In a civil action or proceeding under this subsection in which the complaint does not allege a crime of violence—

"(A) the term 'racketeer' or the term 'organized crime' shall not be used by any party in any pleading or other written document submitted in the action, or in any argument, hearing, trial, or other oral presentations before the court; and

"(B) the terms used to define conduct in violation of section 1962 of this title shall be referred to as follows:

"(i) 'racketeering activity', as defined in section 1961(1) of this title, shall be referred to as 'unlawful activity'; and "(ii) 'pattern of racketeering activity', as defined in section 1961(5) of this title, shall be referred to as 'pattern of unlawful activity'.

"(11) For purposes of this subsection—

"(A) the term 'governmental entity' means the United States or a State, and includes any department, agency, or government corporation of the United States or a State, or any political subdivision of a State which has the power (i) to levy taxes and spend funds, and (ii) to exercise general corporate and police powers;

"(B) the term 'unit of general local government' means any political subdivision of a State which has the power (i) to levy taxes and spend funds, and (ii) to exercise general corporate and police powers; and

"(C) the term 'crime of violence' means an offense involving—

"(i) when chargeable under State law the following: murder, kidnapping, arson, robbery, or dealing in narcotic or other dangerous drugs;

"(ii) when indictable under title 18, United States Code, and when accompanied by serious bodily injury the following: destruction of aircraft or aircraft facilities as defined by section 32; arson as defined by section 81; acts against foreign officials and other persons as defined by section 112 (a), (c) through (f)); acts against Federal officials and other persons as defined by section 115; threats and extortion as defined by section 878; loansharking and other extortionate credit transactions as defined by sections 891–894; homicide as defined by sections 1111–1112, 1114, 1116–1117; hostage taking as defined in section 1203; obstruction of justice as defined in sections 1501–1506, 1508–1513, and 1515; extortion as defined by section 1951; murder-for-hire as defined by section 1958; sexual exploitation of children as defined in sections 2251–2252 and 2256; explosives or dangerous weapons aboard vessels as defined in section 2277; terrorist acts abroad as defined in section 2331; or

"(iii) the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.".

SEC. 5. INTERNATIONAL SERVICE OF PROCESS.

Section 1965 of title 18, United States Code, is amended—

(1) in subsection (b) by striking "residing in any other district";

(2) in subsection (b) by striking "in any judicial district of the United States by the marshal thereof" and inserting "anywhere the party may be found";

(3) in subsection (c) by striking "in any other judicial district" and inserting "anywhere the witness is found";

(4) in subsection (c) by striking "in another district"; and

(5) in subsection (d) by striking "in any judicial district in which" and inserting "where".

SEC. 6. EXCLUSIVE FEDERAL JURISDICTION.

Chapter 96 of title 18, United States Code, shall not be construed to confer jurisdiction to hear a criminal or civil proceeding or action under its provisions on a judicial or other forum of a State or local unit of government.

SEC. 7. STYLISTIC AMENDMENT.

The analysis of chapter 96 of title 18, United States Code, is amended by striking out the item for section 1962 and inserting in lieu thereof the following:

"1962. Prohibited activities.".

SEC. 8. JUDICIAL STANDARD TO DETERMINE REMEDY.

(a) In General.—(1) Except as provided in paragraph (2), the amendments made by this Act shall apply to any civil action or proceeding commenced one day after the date of enactment of this Act.

(2) In any pending action under section 1964(c) of title 18, United States Code, in which a person would be eligible to recover only under paragraph (2)(A) of section 1964(c) as amended by this Act because the action does not meet the requirements of paragraph (2)(B) of section 1964(c), if this Act had been enacted before the commencement of that action, the recovery of that person shall be limited to the recovery provided under paragraph (2)(A), unless in the pending action—

(A) there has been a jury verdict or district court judgment, establishing the defendant's liability, or settlement has occurred; or

(B) the judge determines that, in light of all the circumstances, such limitation of recovery would be clearly unjust.

(b) EXCEPTION FOR COSTS OF CIVIL ACTION.—For purposes of this subsection, in any action in which a person would be eligible, by operation of subsection (a), to recover only under paragraph (2)(A) of section 1964(c) of title 18, as amended by this Act, the person shall also recover the cost of the civil action, which includes, in addition to a reasonable attorney's fee, reasonable litigation expenses.

Senator DECONCINI. We now will proceed to our first witness, Mr. John Keeney, Deputy Assistant Attorney General of the Criminal Division. Mr. Keeney, welcome to the committee. We are going to ask, Mr. Keeney, if you can summarize your statement. Your full statement will appear in the record. We are going to ask all witnesses to summarize their statements in 5 minutes so we can proceed to questioning.

STATEMENT OF JOHN C. KEENEY, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC; ACCOMPANIED BY PAUL COFFEY, CHIEF, RICO REVIEW UNIT, ORGANIZED CRIME SECTION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. KEENEY. Thank you, Senator. I will summarize in less than 5 minutes, and I would ask the chairman if I may have my colleague, Paul Coffey, sit with me. He is Chief of our RICO Review Unit in the Organized Crime Section.

Senator DECONCINI. Yes, very good; please join us.

Mr. KEENEY. Mr. Chairman, as you indicated, my statement is in the record, and I will very briefly summarize the statement.

There has been considerable controversy surrounding the use of RICO, as has been made clear here this morning, by private civil plaintiffs in recent years because of their use of the statute in contexts apart from the original congressional intent to attack organized crime.

This controversy has had an unfortunate spill-over effect on the ability of the Department of Justice to use both criminal and civil RICO, despite our careful internal controls on the statute's use. Thus, after much study, we have come to support the general approach of this bill and others which would limit the recovery of treble damages by private plaintiffs.

Our main concern in commenting on this bill is to ensure that our ability to use criminal and civil RICO is not adversely affected. Our testimony sets forth several examples of recent Government successes under both criminal and civil RICO.

We note that S. 438 embodies the prior conviction requirement for recovery of treble damages by private plaintiffs, which is the approach to civil RICO reform that we generally prefer. However, we are quite willing to consider other approaches if this committee or other congressional bodies should seek our views on them.

With respect to the details of S. 438, we strongly support the provision making it clear that the United States can recover treble damages upon proof of injury by a preponderance of the evidence. We would prefer that such suits be required to be brought only by the Attorney General.

We support the statute of limitations provision, the recovery by persons suffering bodily injury, and the broadened service of process. We support the prior conviction requirement for suits by most private plaintiffs, although we have reservations about the wording of the provision.

We oppose the limitations on the use of the terms "racketeer," "racketeering activity," and "organized crime." We oppose the affirmative defense for reliance upon regulatory action, particularly insofar as it applies to suits by the United States.

We support the addition of some new predicate offenses, but not all those proposed. We express no view with respect to several other provisions that affect only private litigants.

That, Mr. Chairman, is a summary of my statement and I would be glad to answer any questions.

Senator DECONCINI. Mr. Keeney, thank you very much. Mr. Coffey, we are very, very glad to have you join us.

Mr. Metzenbaum asked me to start off, and he has a question. He had to leave to go to another committee meeting and I will ask his question right now. He asked me what the position of the Justice Department was on application of pending cases.

Mr. KEENEY. The retroactivity provision?

Senator DECONCINI. Yes, sir.

Mr. KEENEY. We have testified in the House and we suggested that there is a certain fundamental unfairness in the retroactivity and we have not changed our position, although it does not directly impact the Department of Justice.

Senator DECONCINI. What about the changes in this bill versus the House bill and last year's bill that do provide that they can still recover attorneys' fees, reasonable costs and attorneys' fees? Does that make any difference?

Mr. KEENEY. That is not something on which we have a strong position, Senator.

Senator DECONCINI. Have you had a chance to review——

Mr. KEENEY. I haven't really focused on that.

Senator DECONCINI. Would you mind doing that for us, whatever your position is?

Mr. KEENEY. Yes, sir.

Senator DECONCINI. Thank you.

Mr. Keeney, in your statement you expressed the Department's view that RICO should be simplified and, of course, I agree with you. Would the Department support legislation to detreble all civil RICO cases except where the Government is plaintiff and those that are brought after a conviction for a RICO predicate offense?

Mr. KEENEY. Yes.

Senator DECONCINI. And could the Department support legislation that would repeal civil RICO, except for Government plaintiffs or after a RICO predicate offense conviction?

Mr. KEENEY. Yes.

Senator DECONCINI. In the ongoing investigation of fraud in the savings and loan industry, isn't it true that most depositors are fully covered under Federal Reserve and loan insurance corporations? The real loser then–we know the answer to that—because of fraud in savings and loans is the FSLIC.

Isn't the ability of the FSLIC to recover treble damages against fraudulent savings and loans actually enhanced by S. 438?

Mr. KEENEY. I don't know that it is enhanced, Senator. We have the ability to——

Senator DECONCINI. They do it now, anyway.

Mr. KEENEY. We have the ability to do it now by utilization of the mail and wire fraud statutes. One of the things we would commend to the committee, though, is to bring the bank fraud statute in as a predicate act. That would be helpful and it would cover those situations where we didn't have the fortuitous circumstance of use of the mails or interstate wires. It would be helpful, and I would commend that to you.

Senator DECONCINI. Mr. Keeney, a subsequent witness will testify that Indian tribes should be entitled to governmental status under S. 438, and thereby entitled to treble damages in civil RICO suits. Does the Department support such an amendment, or have you had a chance to focus on that?

Mr. KEENEY. Senator, we haven't focused on that, and I am not as familiar with the Indian problem as a lot of people, yourself, in particular, and we would be glad to think about that and submit.

Senator DECONCINI. I would appreciate it if you would submit your opinion on that—the Justice Department's.

Does the Department support the existence of a Federal treble damage fraud statute?

Mr. KEENEY. Independent of RICO?

Senator DECONCINI. Independent.

Mr. KEENEY. Yes, sir.

Senator DECONCINI. Isn't that really what civil RICO threatens to become, if it isn't already?

Mr. KEENEY. It is pretty much in that direction, yes, sir.

Senator DECONCINI. Why should fraud traditionally in the jurisdiction of States be singled out for special Federal treble damages? I just say that rhetorically.

Mr. KEENEY. Well, I don't think it should be, except where the Federal Government is the victim, as in the savings and loan situation.

Senator DECONCINI. Yes, sir; very good.

The Senator from Iowa, any questions of the witnesses?

Senator GRASSLEY. Thank you very much for your attendance at this hearing, and also your interest in this problem we have before us.

I would like to know the Justice Department's reaction to what I have already referred to in my opening statement, the recent writings and comments by the Chief Justice regarding the status of the operation of the current RICO statute.

Do you think the Chief Justice has some valid criticisms or is he only concerned with the problem of caseload within the Federal judiciary and minimizing that caseload?

Mr. KEENEY. We think he has some valid criticisms in the private civil use of RICO. On the other hand, we don't think that he has criticized, or at least I never read any criticism, of the use by the Federal Government either civilly or criminally, which is a tightly controlled matter in the Department of Justice.

Senator GRASSLEY. Even though the question of jurisdiction of the RICO cases may not have an effect on the cases brought by the United States, does the Department have guidance to offer the committee regarding placing exclusive jurisdiction of RICO cases in the Federal courts?

Mr. KEENEY. We think that the Federal RICO jurisdiction should be confined to Federal courts, and that State RICO statutes—if the States want to move in that direction, there should be State RICO statutes, as there are in many States.

Senator GRASSLEY. OK. Just as a general approach to this legislation, I would like to have you explain why or why not the possibility of an award of treble damages serves a needed public policy purpose within the operation of our judicial system?

Mr. KEENEY. You are talking now about both governmental RICO suits and nongovernmental?

Senator GRASSLEY. Start with governmental.

Mr. KEENEY. In governmental, it has an opportunity to most effectively move against people who are violating the law and it does have a very substantial deterrent effect where people who have been using—for instance, in the procurement area, have been defrauding the United States, there should be a sufficient penalty to deter not only them, but similarly situated persons in the future.

Senator GRASSLEY. Yes, and explain how that still fits the original intent of Congress that enacted the legislation in 1970.

Mr. KEENEY. Well, I think it does fit the original intent. The Congress originally, when it considered this legislation, was concerned with organized crime, as such—organized crime syndicates.

In the debates, it became clear that focusing on a special class such as that might create constitutional problems. Congress, in its debates, then decided that the statute should be broadened to pick up additional organized, systematic criminal activity that might not meet what they considered then the definition of organized crime.

Senator GRASSLEY. I have three questions that Senator Thurmond asked me to ask you. He can't be here because of a conflict.

"Is it still the practice under the Department of Justice guidelines whereby every RICO prosecution is reviewed in Washington before being followed to check the overuse or possible abuse of the RICO law?"

Mr. KEENEY. Yes, sir, both civil and criminal.

And with one exception—and this is one of the things that I have addressed in the statement. We don't have total control by actions that would be brought by FDIC, FSLIC, and other semi-independent agents, and they have brought some suits and they worked out all right.

But that is one weakness in our control over the RICO statute. Other than that, we do control everything that goes in through the Department of Justice system.

Senator GRASSLEY. "How effective has RICO been as a law enforcement tool in combating organized crime compared to the continuing criminal enterprise or drug kingpin statute?"

Mr. KEENEY. Well, both statutes have been very effective. We think that RICO has been fantastically successful against the leadership and even the lower echelons of organized crime throughout the country.

We set forth in our statement a list of the victories that we have had in the last 5 or 6 years. Senator, we have taken out the leadership of organized crime, the La Cosa Nostra, from Boston to Los Angeles and from Chicago down to New Orleans and Kansas City. We have been very successful. We wouldn't have been able to do it without the RICO statute. We wouldn't have been able to do it without some of the other statutes that you have given us over the years; namely, witness protection, immunity, and so forth. But RICO has been a very key factor in our successes.

Senator GRASSLEY. As a summary statement, Senator Thurmond wanted to know, overall, "is it the opinion of the Department of Justice that this proposal before us improves the current RICO statute?"

Mr. KEENEY. Yes, sir, we do. We have agonized over civil RICO for a number of years, and if you can look back at the testimony that we have given, some of it by me, we were not sure. We moved slowly in this area because we were not certain.

We were in a civil area that we did not feel very comfortable in. But after consideration and much discussion with the Congress, we have concluded that something should be done. The present statute is not perfect, but we think it is a good bill that will address the problem in many respects, large respects.

Senator GRASSLEY. Last, Senator Thurmond was interested in your response, as I was in my question to you, about Chief Justice Rehnquist's comments, but I think you have addressed that.

Mr. KEENEY. I think so, sir.

Senator GRASSLEY. Thank you, Mr. Chairman.

Senator DECONCINI. The Senator from Wisconsin.

Senator KOHL. Thank you.

Mr. Keeney, in your prepared testimony you express some concerns about the bill's affirmative defense. I am also concerned about this. Do you think a regulatory agency's silence could be seen as a blessing of the defendant's conduct? It talks about operation by law.

Mr. KEENEY. I think the regulatory agency's silence, if the matter has been brought to their attention, is relevant, and that should be a matter that is brought into the criminal trial.

But we would prefer, rather than it being brought in as an affirmative defense, that it be brought in with respect to the proof of intent by the Government, and it would be relevant with respect to intent.

Senator KOHL. Could this provision protract each case?

Mr. KEENEY. It puts a confusing element, in my mind, in it. Senator, we could live with this provision, but we think it would be a better bill without it.

Senator KOHL. OK. On page 15 of your prepared testimony, you seem to suggest that Senator DeConcini's bill is too complex. Is there an easier way to reform RICO?

Mr. KEENEY. Well, it is no more complex than most of the RICO reform bills, and we recognize, you know, pragmatically that there are problems here to be addressed. And it seems Senator DeConcini's bill is complicated, it is complex, but it is a compromise and we think it is a reasonable compromise which we can live with.

Senator KOHL. OK. Senator DeConcini's bill lets a plaintiff sue for treble damages if the defendant is already found guilty in a criminal court. I think that is good, but it is not clear to me just who can sue for treble damages in this situation.

My question is, does a person's ability to get treble damages depend on whether he or she was named as a victim in the criminal indictment?

Mr. **Keeney**. They wouldn't have to be named as a victim, but the person would have to be within the class of victims that were covered by the prosecution.

Senator **Kohl**. OK. Well, let me——

Mr. **Keeney**. My colleague has a comment.

Senator **Kohl**. Yes, go ahead, sir.

Mr. **Coffey**. The statute would still require that the plaintiff be injured by the pattern of racketeering, the RICO violation. So, whether the plaintiff in the civil case was named as a victim in the criminal prosecution, the plaintiff would have to establish that he or she was injured by the criminal acts of the defendant.

I think there is a continuing debate in the courts whether that injury has to be direct or whether it can be indirect. In fact, there is an issue before us in the Department now, when the Government sues for treble damages under 1964(c), whether the Government has to be directly injured or it can still qualify if it is indirectly injured, and that hasn't been resolved yet.

Senator **Kohl**. OK.

Mr. **Keeney**. We would commend that to the committee to consider whether they want to cover both direct and indirect, particularly insofar as the Federal Government is concerned.

Senator **Kohl**. Let me just ask this specific example. If a defendant pleads guilty to injuring Mr. Smith so that the prosecutor will drop a charge that he also hurt Mr. Jones, can Mr. Jones sue for treble damages?

Mr. **Coffey**. I would say yes, under prevailing case law. Yes.

Senator **Kohl**. OK.

Mr. **Coffey**. That is an opinion, though. We haven't actually had that resolved by the courts, to my knowledge, on that stark set of facts.

Senator **Kohl**. OK. The Justice Department can't watch over all illegal conduct; there just aren't enough of you. Since that is so, I assume that you welcome help from private attorneys general who file their own RICO suits.

Mr. **Keeney**. We do, to the extent that the so-called private attorneys general do not bring cases that should not be brought and result in decisions on the RICO statute which have a carryover effect to the criminal actions and the civil actions brought by the Federal Government.

Senator **Kohl**. Thank you, Mr. Chairman.

Senator **DeConcini**. The Senator from Alabama, any opening statement or questions of the witnesses?

Senator **Heflin**. I don't believe so right now.

Senator **DeConcini**. Fine.

Mr. Keeney, before you leave, I just want to clarify a question I asked you regarding the private right of action for fraud. Does the Department support the existence or enactment of a Federal treble damages private right of action for fraud?

Mr. **Keeney**. Is there a pending bill on that, Senator? I am not familiar with it.

Senator **DeConcini**. No, no.

Mr. **Keeney**. I would think, in concept, the Department would support a treble damage——

Senator **DeConcini**. For a private right of action?

Mr. **Keeney**. For——

Senator **DeConcini**. For the Government, only?

Mr. **Keeney**. For the Government.

Senator **DeConcini**. That is what you said last time. You said yes, and then I believe you indicated as far as the Government is concerned.

Mr. **Keeney**. Yes. I have reservations on that in the private area.

Senator **DeConcini**. But if it expressed an opinion regarding a private action of fraud, the answer is that you probably would not support that?

Mr. **Keeney**. That is my reaction, yes.

Senator **DeConcini**. Thank you. I just wanted to clarify that. Thank you very much, Mr. Coffey, Mr. Keeney.

[The prepared statement of Mr. Keeney and response to written questions follow:]

STATEMENT

OF

JOHN C. KEENEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING

S. 438, THE RICO REFORM ACT OF 1989

JUNE 7, 1989

Mr. Chairman and Members of the Committee, it is a pleasure to be here today to discuss with you S. 438, the "RICO Reform Act of 1989." Before providing our specific comments on this bill, I would like to discuss briefly our general approach to civil RICO reform.

As you know, for several years there has been considerable controversy in the courts, the private bar, and various interest groups with regard to the use of the treble-damages provision of civil RICO, 18 U.S.C. § 1964(c), by private plaintiffs. Many commentators have criticized the statute's use in contexts that appear to be outside the central purpose of RICO, which _is_ to attack organized crime groups and others who commit serious crimes that affect legitimate businesses and organizations. Private civil suits have been brought that concern a wide range of conduct, ranging from disputes about commercial contracts and interest rates to the purchase of baseball tickets to, in a recent controversial case, suits against anti-abortion protesters who destroyed equipment and harassed patrons and employees of an abortion clinic. [1]

As a by-product of the outcry over private civil RICO suits, there has begun to be a "spill-over" effect, resulting in criticism of the government's use of the criminal and civil RICO provisions. Because we use the RICO provisions only in circumstances that conform to the Congressional intent, and according to a strict internal process of review and control, we strongly believe that such criticism is unjustified. However, this spill-over effect is threatening to have a negative impact on our ability to continue to use RICO, one of our most important law-enforcement tools, as we have in the past with such great success. Thus, in order to eliminate the spill-over effect that comes as a by-product of criticism of private civil suits, and in recognition that some uses of the treble-damages provision by private plaintiffs have been unwarranted, we have for several years been working with the appropriate Senate and House committees to achieve a workable compromise solution. The present bill represents the latest stage in the evolution of this process, and we support it in most respects. Before turning to a discussion of the bill's specific features, however, I would like to emphasize to the Subcommittee the importance of maintaining, and even strengthening, the statute's provisions, criminal and civil, that have been used by the government with such dramatic success in recent years.

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[1] _Northeast Women's Center, Inc. v. McMonagle_, 868 F.2d 1342 (3d Cir. 1989).

THE NEED FOR A STRONG RICO STATUTE

The Department of Justice has achieved unprecedented successes against organized crime over the past several years. The results obtained in cases against La Cosa Nostra (LCN) defendants have been particularly satisfying. We have used the criminal RICO provisions to dismantle organized crime families around the country. To date in the 1980s, we have secured RICO convictions of the heads and principal lieutenants of LCN families in Boston, Buffalo, Chicago, Cleveland, Kansas City, Los Angeles, New Orleans, Philadelphia, Rochester, and four of the five major LCN families in New York City. In addition, RICO has helped us get many other convictions of lower-ranking organized crime members and associates.

A few examples of recent major RICO prosecutions will illustrate how vital the statute is to our continuing success against organized crime.

In United States v. Angiulo, the hierarchy of the Boston crime family, including its boss Gennaro Angiulo, his counselor, and several capos, were convicted of RICO in 1986, after an eight-month trial. The case was predicated on court-authorized electronic surveillance in which the defendants were overheard discussing six murders and a wide variety of street crimes and illegal financial investments. Eventually, the defendants received lengthy jail sentences and forfeited real estate worth $4 million.

In Manhattan, millions of Americans closely followed the progress of the so-called LCN "Commission" and "Pizza Connection" RICO cases. In the former, the ruling body of New York City's five LCN families, known as the "Commission," was the RICO enterprise. In addition to the usual evidence of murders, extortion, and labor racketeering typical of organized crime, the evidence also revealed that the Commission, through its control of Local 6A of the Cement and Concrete Workers Union, extorted 2% of every contract in Manhattan exceeding a projected cost of $2 million. In effect, the mob imposed a 2% sales tax on major construction projects in Manhattan.

The principal defendants were convicted and received jail sentences up to 100 years for RICO and related offenses. In the "Pizza Connection" case, after a trial exceeding a full year, 30 international heroin traffickers were convicted of importing tons of heroin into the United States and exporting hundreds of millions of dollars in laundered profits into foreign bank accounts around the world.

The RICO convictions of mob bosses Carl Civella and Carl DeLuna in Kansas City in 1984 and 1986 marked the climax of a series of prosecutions which involved the skimming of money from several Las Vegas casinos. The prosecutions were based on four thousands hours of electronic surveillance in five judicial districts.

The Kansas City skimming prosecution included evidence that certain LCN defendants used their influence with the Teamsters Central States Pension Fund in Chicago in order to obtain loans exceeding $80 million for the acquisition and improvement of casinos.

In Brooklyn, 15 defendants, including Bonanno LCN boss Philip Rastelli and the entire leadership of Teamsters Local 814, were convicted in 1986 of a RICO bid-rigging, kickback scheme to monopolize New York City's moving and storage industry, including government moving contracts.

At the same time that the Rastelli defendants were unlawfully operating and extorting moving and storage companies, members of the Lucchese LCN family had moved to take control of commercial trucking traffic at New York's Kennedy Airport. Again using RICO, federal prosecutors in Brooklyn have convicted Harry Davidoff, a prominent official of Teamsters 851, and several other defendants for systematically extorting kickbacks from domestic and international freight forwarders vulnerable to labor unrest.

Also in Brooklyn, Colombo family capo Michael Franzese in 1986 received a ten-year RICO sentence, forfeited $4 million to the United States, and was ordered to pay $10 million in restitution to New York, Florida, and New Jersey tax authorities. Franzese's business activities included automobile dealerships, oil and gasoline distributorships, a movie production company, construction firms, and a union-sponsored employee benefit plan.

In August 1987, Salvatore "Sam" T. Busacca, president of Teamsters Local 436, was convicted in Cleveland of RICO and labor-racketeering charges arising from his embezzlement of union funds.

In May 1988, a RICO prosecution resulted in prison terms of up to ten years for Peter J. Milano, the boss of the Los Angeles LCN family, and seven other members of that family's top leadership.

On May 26, 1988, in Brooklyn, Mario Renda, founder and president of First United Fund, Ltd., pleaded guilty to RICO conspiracy and other charges arising from the largest union fraud scheme ever prosecuted by the Justice Department. His co-defendant, Martin Schwimmer, was convicted by a jury late last year. As a result of the convictions, the defendants forfeited $4.25 million to the government.

Late last year, a federal jury in Philadelphia convicted LCN boss Nicodemo Scarfo and his co-defendants (including the underboss, a former underboss, two capos, and one former capo) of RICO charges involving drugs, extortion, gambling, and 14 murders.

On January 13, 1989, a federal jury in Cleveland convicted Teamsters International Vice-President Harold Friedman and a co-defendant of embezzling hundreds of thousands of dollars from two Cleveland locals through payments to "ghost" employees. The third defendant, Teamsters General President Jackie Presser, died prior to trial.

On December 29, 1988, after an eight-week trial, a jury in Rochester convicted La Cosa Nostra boss Loren Piccarreto, along with a capo and a "made" member, of RICO. Two other defendants, including Angelo Amico, the Rochester family's acting "street boss," pleaded guilty to RICO in October 1988. The charges arose from the defendants' conducting illegal gambling businesses and extorting the operators of other such businesses.

High-profile organized crime and labor racketeering cases such as these, despite their great importance to our enforcement efforts, are only one part of the overall RICO picture. Since

1981, when the Department instituted its centralized review and approval process for all government RICO cases, we have approved approximately 800 RICO prosecutions against more than 3,000 defendants. Those cases have involved serious criminal activity of almost limitless variety, ranging from sophisticated bank and securities frauds [2] to armored car robberies and murders by a highly structured band of neo-Nazi terrorists. [3]

One of the most important uses of RICO, apart from attacking traditional organized crime enterprises and labor racketeering, has been in the area of public corruption. Since 1984, when we began keeping detailed statistics, 27% of all approved RICO prosecutions have involved public corruption at the state, local, or, occasionally, the federal level. Perhaps the most sustained use of RICO to prosecute a series of related cases was operation "GREYLORD," in which, to date, 14 judges, 47 attorneys, and 22 other individuals have been convicted of RICO in connection with corrupt activities in the Cook County, Illinois, court system. [4]

Another area in which RICO prosecutions have proved invaluable is narcotics trafficking. Since 1984, this fact pattern has been the second most prevalent, accounting for 25% of all RICO cases approved by the Criminal Division. By contrast, it may be instructive to note that securities fraud, whose use as a RICO predicate has generated controversy in the media recently, has been the primary factual scenario in only about one percent of all RICO prosecutions since 1984. It also is worth noting that about 50% of all RICO prosecutions seek forfeiture of illegal proceeds or other assets connected to the defendants' racketeering activity. We expect that percentage to increase as prosecutors become more familar with the use of this powerful penalty in RICO prosecutions.

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[2] E.g., United States v. Galanis, No. S 87 Cr. 520 (CLB) (S.D.N.Y. 1987).

[3] United States v. Yarbrough, 852 F.2d 1522 (9th Cir. 1988).

[4] See, e.g., United States v. LeFevour, 798 F.2d 977 (7th Cir. 1986).

These successes with criminal RICO do not tell the whole story of the government's use of RICO. It has become apparent over the years that convictions alone, even accompanied by heavy prison sentences, fines, and forfeitures, do not always remove the racketeering influence from legitimate organizations. This has proved to be particularly true in the area of labor racketeering, where, when corrupt union officials are convicted, their influence may be perpetuated through "puppets" who are maintained in office by union members who have become too intimidated by mob violence or too accustomed to corruption to throw the old regime out. Thus, over the past several years we have begun to use, with some dramatic results, the civil RICO provisions.

GOVERNMENT'S USE OF CIVIL RICO

Given that a civil RICO suit is not always the preferred approach to removing corruption from legitimate organizations, the few cases that we have carefully chosen to file have had an extremely significant overall impact. In the context of suits for equitable relief under 18 U.S.C. § 1964(a), we look for situations where the history of racketeering within an enterprise demonstrates that criminal prosecutions alone are unlikely to get the job done. A prime example is the International Brotherhood of Teamsters ("IBT"). As you know, our civil RICO suit in Manhattan against the IBT's Executive Board was settled in March of this year on the eve of trial.[5] Over the last 30 years, federal prosecutors had successfully prosecuted 200 cases involving Teamsters-related offenses, resulting in more than 340 convictions. Yet the LCN influence remained. Removing racketeers from their Teamsters jobs, while important, had not corrected a system which perpetuated their influence.

Apart from the suit involving the Teamsters International, the government's most dramatic success with civil RICO to date is the suit involving Teamsters Local 560 in New Jersey.[6] The government sued in 1982 to rid the union of the influence of organized crime figures who had corrupted the union and its executive board through a pattern of violence and intimidation over a period of more than twenty years. After a lengthy trial, the district court issued injunctions against organized crime defendants and removed the entire executive board from office, appointing a trustee to supervise the union's affairs until fair elections could be held. The court's actions were upheld by the Court of Appeals in 1985, and the Supreme Court declined review in 1986. Free and fair elections were held late last year, for the first time in nearly 25 years.

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[5] United States v. International Brotherhood of Teamsters, No. 88 Civ. 4486 (DNE) (S.D.N.Y. 1988).

[6] United States v. Local 560, International Brotherhood of Teamsters, 780 F.2d 267 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986).

Following the success in Local 560, prosecutors filed suits alleging corruption of unions and related businesses in Manhattan, Brooklyn, and Philadelphia. In one major action, the United States Attorney in Brooklyn in 1987 filed a suit against the Bonanno Family, Teamsters Local 814, and others. [7] The suit, which is based largely on prior prosecutions by the Brooklyn Strike Force, [8] sought to remove the organized crime influence from the union and obtain the appointment of a trustee. The suit also seeks treble damages in connection with criminal activity that injured the government financially. Pursuant to consent decrees, much of the requested relief has been granted. The trustee supervised fair elections in February of this year; the voter turnout was two-and-one-half times greater than ever before. Some legal issues in the case, including whether the United States is a "person" entitled to recover treble damages under RICO, are currently before the

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[7] United States v. Bonanno Organized Crime Family, 638 F. Supp. 1411 (E.D.N.Y. 1988).

[8] E.g., United States v. Rastelli, No. 87-1057 (2d Cir. March 16, 1989).

Court of Appeals.

In December 1987, federal prosecutors in Philadelphia filed a major civil RICO suit against Roofers Local 30 and several of its officers, immediately upon the criminal RICO convictions of business manager Stephen Traitz, Jr., and others. [9] The evidence in the criminal trial established that Traitz and others used physical violence and intimidation to exact payoffs to the union. Following a hearing on the government's request for a civil injunction, the district court in May 1988 appointed a "court liaison officer" to monitor the union's affairs and granted broad equitable relief. [10]

In a suit involving Cement and Concrete Workers Local 6A in Manhattan, [11] which was a follow-up to a criminal RICO prosecution of members and associates of the LCN Colombo Family,[12] the government obtained consent agreements that, among other provisions, restricted the union defendants' participation in union affairs. Under the agreements, the court also appointed a monitor to oversee the operations of the union. The monitor has already successfully supervised one free and fair election; he will supervise another in 1990, and he will remain in office until 1991.

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[9] I am pleased to report that the Third Circuit Court of Appeals affirmed the convictions on March 22, 1989. United States v. Traitz, No. 88-1048 (3d Cir. March 22, 1989).

[10] The Third Circuit Court of Appeals recently upheld the granting of the permanent injunction in all respects. United States v. Local 30, United Slate, Tile and Composition Roofers Association, No. 88-1508 (3d Cir. March 23, 1989).

[11] United States v. Local 6A, Cement and Concrete Workers, 663 F. Supp. 192 (S.D.N.Y. 1986).

[12] United States v. Persico, 832 F.2d 705 (2d Cir. 1987).

The government also has filed several other labor-related civil RICO cases in recent years, involving unions associated with the Fulton Fish Market in New York, [13] Teamsters Locals 804 and 808, [14] and, in a follow-up action, Teamsters Local 560. [15]

Federal prosecutors have successfully used the equitable provisions of civil RICO in non-labor contexts as well. In New York, the government obtained equitable relief against persons who had been skimming profits from several restaurants and bars. [16] One restaurant is in permanent receivership following litigation in which the government prevailed through the Court of Appeals. In Brooklyn, a RICO complaint has been filed alleging that certain doctors and pharmacists improperly issued and filled thousands of forged and fraudulent prescriptions for drugs typically used by addicts. The suit seeks broad equitable relief. [17] We are contemplating using the equitable provisions in other non-labor areas as well.

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[13] *United States v. Local 359, United Seafood Workers, Smoked Fish & Cannery Union, United Food and Commercial Workers International Union*, No. 87 Civ. 7351 (TPG) (S.D.N.Y. Jan. 24, 1989).

[14] *United States v. Long*, No. 88 Civ. 3289 (S.D.N.Y. 1988).

[15] *United States v. Gigante*, Civ. No. 88-4396 (D.N.J. 1988).

[16] *United States v. Ianniello*, 824 F.2d 203 (2d Cir. 1987).

[17] *United States v. Kissena Pharmacy, Inc.*, No. CV-89-1354 (E.D.N.Y. filed April 27, 1989).

In addition to the equitable provisions of 18 U.S.C. § 1964(a), the government has brought a few actions for treble damages under Section 1964(c), in cases where the United States was injured by a RICO violation. Those cases to date have involved a multi-million-dollar contract fraud against the Army,[18] fraud against a federally insured credit union, [19] fraud in connection with a federal crime insurance program, [20] and fraud against the government in connection with a moving contract, charged in the Bonanno Family suit. The FDIC and FSLIC also have brought some treble-damages RICO suits. [21]

Such cases have been fewer than the equitable actions, partly because the government must be a victim in order to recover. Another problem, however, is that the courts have not yet made it clear whether the government is a "person" that has standing to sue under Section 1964(c). One feature of S. 438 that we strongly support is new Subsection 1964(c)(1), which would make it clear that the United States has standing to sue for treble damages.

Before I turn to our specific comments on S. 438, I would like to state that the Department of Justice is firmly committed to some sort of civil RICO reform. We have noted that each year ~~the~~ cries of RICO's critics have become increasingly strident. There is no doubt that some degree of reform is called for. It is the Congress, through the work of Committees such as this one and other appropriate bodies, that is in a position to state what the limits of reform should be. If this Committee should, in the course of its examination of RICO, seek our views on particular issues not directly addressed by S. 438, we would be pleased to respond to the Committee in the future. Our main concern at this time is to ensure that the Department of Justice retains its present ability to use the criminal and civil provisions of RICO to continue to combat organized crime, labor racketeering, and other serious criminal conduct with the same degree of success that we have enjoyed in recent years.

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[18] United States v. Barnette, No. 85-754-CIV-J-16 (M.D. Fla. 1985).

[19] United States v. Rivieccio, No. CV-86-1441 (E.D.N.Y. 1987).

[20] United States v. Shasho, No. CV-86-1667 (E.D.N.Y. 1986).

[21] E.g., Federal Deposit Insurance Corp. v. Antonio, 843 F.2d 1311 (10th Cir. 1988); Federal Deposit Insurance Corp. v. Hardin, 608 F. Supp. 348 (E.D. Tenn. 1985).

I also would like to make one other general point regarding the philosophy of civil RICO reform. In considering this bill and other similar ones, we generally have not commented on the details of specific provisions that affect only suits by private plaintiffs, such as the provisions regarding double punitive damages and the various classes of plaintiffs that would be entitled to recover greater than actual damages. However, we do have one observation to make about these provisions of this bill and similar bills. One recurring criticism of RICO is that the statute is already too complex to be effective. If "reform" legislation ultimately contains the classifications and carve-outs for various plaintiffs that have characterized many reform bills, and, to some extent, this bill, RICO may become an unwieldy structure of complex provisions limited by exceptions and exceptions to the exceptions. Assuming, as we do, that some modification of Section 1964(c) is desirable, it may be that the reality of competing interests dictates the need for some degree of complexity in the provisions governing recovery of damages. However, the statute will not become more effective by becoming more complex; the hallmark of reform should, if possible, be simplicity. In our view, it is preferable to look for ways to streamline the statute to the extent possible, rather than burdening it with an overly intricate framework.

COMMENTS ON S. 438

I will now turn to our specific comments on the provisions of this bill. S. 438, which is the latest version of a RICO reform proposal that has been pending in Congress in various forms for several years, represents the general approach to RICO reform that we have come to prefer after devoting several years of extensive study and consideration to the issues involved.

S. 438's most important feature limits private civil plaintiffs to the recovery of actual damages except where the defendant has been convicted of a related crime or where the plaintiff fits into certain categories of persons who would be entitled to recover double punitive damages. We believe this solution, although not perfect, is a fair and reasonable approach to RICO reform. We do, however, have some reservations about specific provisions of the bill. Our comments on the bill's individual features are as follows.

This new bill meets many of the concerns that we expressed in our comments on earlier bills, and incorporates our requested improvements to civil RICO. We are particularly pleased to note, as I mentioned earlier, that S. 438 expressly provides that the United States can recover treble damages under civil RICO. We also welcome the inclusion of a suitably extensive limitations period for suits by the United States (six years after accrual of the cause of action) and the codification of the preponderance-of-the-evidence burden of proof for all suits by the government.

In addition, we endorse the provision in the bill's new Subsection 1964(c)(3) that would permit recovery of actual and punitive damages by a person who is bodily injured by a RICO violation, and we support the broadened provisions for service of process in Section 5 of the bill.

With respect to the features of S. 438 that are designed to limit private treble-damages actions, the bill generally adopts the approach that we have supported in our comments on earlier bills. Specifically, the bill, in proposed Subsection 1964(c)(5), would permit treble-damages recovery by private plaintiffs only against a defendant who was previously convicted of a federal or state offense "based upon the same conduct upon which the plaintiff's civil action is based." While we support the concept of a prior-conviction requirement, we prefer the approach of S. 1523 and H.R. 4923 in the last Congress, which would require that the conviction be for RICO or a specified racketeering activity. Permitting the suit to be based on any "offense" related to the conduct at issue suffers, in our view, from vagueness and could lead to confusion and excessive litigation about the relatedness of the prior conviction.

The bill also contains some other features that are troubling to us. First, the bill's new Subsection 1964(c)(10) would prohibit the use of the terms "racketeer," "racketeering activity," and "organized crime" in any civil damages action in which the complaint did not allege a crime of violence as defined in new Subsection 1964(c)(11). We strongly object to this provision, insofar as it would apply to suits by the United States. The government has brought, and will continue to bring where appropriate, civil RICO suits for treble damages. All such suits must involve financial injury to the United States, such as injury resulting from fraud in connection with defense contracts or fraud in connection with government-insured banks. Such cases generally do not include crimes of violence as defined by this bill. However, such cases do involve multi-million-dollar losses to the government from criminal conduct that is quite properly labeled "racketeering activity." There is no history of abuse of the civil RICO provisions by the United States; our stringent review process prevents any such abuse. Therefore, there is no need to restrict the government's use of these properly descriptive terms. We also note that the bill's definition of "crime of violence" is quite limited; for example, most of the included crimes, such as Hobbs Act extortion, 18 U.S.C. § 1951, are considered violent only if "accompanied by serious bodily injury." It would be improper, in our view, to prohibit use of the term "racketeer" in a case in which a defendant allegedly threatened to kill an extortion victim, but did not actually injure the victim. Although, as noted above, we object to the application of this provision to suits by the United States, if the provision is to be enacted at all we believe a preferable definition of "crime of violence" is that contained in 18 U.S.C. § 16.

We also object to the affirmative defense set forth in proposed Subsection 1964(c)(7), insofar as it would apply to actions by the United States. We believe it is not appropriate to permit a defendant in a suit by the United States to rely on a ruling of an administrative agency. Moreover, in every RICO suit, even though the standard of proof is only a preponderance of the evidence, the government still must prove that the defendant intended to commit two or more criminal predicate offenses. We believe the issue of good-faith reliance on a regulatory ruling should be resolved in the context of determining whether the defendant had the requisite criminal intent, rather than injecting a potentially confusing affirmative defense into the equation.

Section 2 of the bill adds numerous offenses to the list of RICO predicates in 18 U.S.C. § 1961(1). We have generally resisted the wholesale addition of predicate offenses to RICO, because we believe the statute should retain its original focus on crimes characteristic of organized criminal activity. As that focus becomes blurred through the addition of crimes of a different nature, there is a danger that the statute will become increasingly overextended and controversial, possibly leading to increased attacks in court and by RICO's critics. In general, there is no great need for the proposed new predicates. It would be a rare case in which an act of violence, particularly one involving murder, could not already be prosecuted under RICO or other existing federal statutes, such as 18 U.S.C. §§ 1958-1959. With respect to fraud, we do recognize a need to add some predicate offenses to address the widespread involvement of organized crime and other criminal influences in corrupting financial institutions. From this point of view, following is our analysis of the merits of each offense that would be added by S. 438:

-- Prostitution involving minors (state law): We support this addition.

-- 18 U.S.C. § 32 (destruction of aircraft or aircraft facilities): We oppose this addition. The maximum prison sentence of 20 years provides a sufficient penalty for this offense, in our view. If the existing penalty is deemed to be insufficient, the better approach is to amend the statute itself to increase the penalty.

-- 18 U.S.C. § 81 (arson): We oppose this addition. Most acts involving arson are already predicate offenses under state law.

-- 18 U.S.C. § 112(a), (c)-(f) and 115 (attacks on foreign and federal officials): We oppose these additions. If the conduct is serious enough to result in harm to the individual, it is likely already covered by existing RICO predicates. If not, there is no need to add it as a predicate.

-- 18 U.S.C. §§ 510, 513 (forgery of certain securities): We support these additions.

-- 18 U.S.C. § 878 (threats and extortion involving foreign officials): We oppose this addition for the reasons stated in connection with Sections 112 and 115, above.

-- 18 U.S.C. § 1030 (computer fraud): We support this addition, except for those offenses which are punishable only by fines and imprisonment for not more than one year, under Section 1030(c)(2)(A).

-- 18 U.S.C. §§ 1111-1112, 1114, 1116-1117 (homicide): We oppose these additions. Virtually all murders that could be prosecuted under these statutes are already covered by RICO's existing predicate offenses of state murder or under 18 U.S.C. § 1958 (murder for hire). In addition, most murders characteristic of organized crime can also be prosecuted individually under Section 1958 or under 18 U.S.C. § 1959, involving violent crimes in aid of racketeering. This proposed addition is a good example of an amendment that appears on its face to be worthwhile, but that would, in reality, unnecessarily expand RICO without a concomitant benefit to law enforcement.

-- 18 U.S.C. § 1203 (hostage taking): We oppose this addition for the reasons stated in connection with Sections 112 and 115, above.

-- 18 U.S.C. §§ 1501-1506, 1508-1513, 1515 (obstruction of justice): We support these additions.

-- 18 U.S.C. § 2277 (explosives aboard vessels): We do not oppose this addition, although the more direct approach would be to increase the penalty for this offense.

-- 18 U.S.C. § 2318 (trafficking in counterfeit records, motion pictures, etc.): We support this addition.

-- 18 U.S.C. § 2331 (terrorist acts abroad): We oppose this addition for the reasons stated in connection with Sections 112 and 115, above.[22]

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[22] There is a slight technical problem with this addition. The bill inserts Section 2331 in the list of RICO predicates after Section 2320, relating to motor vehicle and motor vehicle

-- Section 134 of the Truth in Lending Act (15 U.S.C. § 1644) (credit card fraud): We support this addition.

-- Section 5861(b)-(k) of the Internal Revenue Code of 1986 (26 U.S.C. § 5861(b)-(k)) (firearms controls): We oppose this addition. To the extent that firearms are actually used to commit violent acts, those acts are most likely reachable under RICO or under 18 U.S.C. §§ 1958-1959. The improper possession or transfer of the firearms themselves is better addressed through the existing framework of regulatory statutes and the legislative changes recommended in the President's proposal to combat violent crime.

Finally, we believe two provisions should be clarified. First, new Subsection 1964(c)(1)(B)(i) would require that all RICO damages suits by the United States be brought by the Attorney General "or other legal officer authorized to sue." This last phrase is vague, and could lead to confusion. We believe it is important that all government RICO suits be brought or authorized by the Attorney General or his designee; accordingly, we would prefer that the quoted language be deleted. Second, although new Subsection 1964(c)(1)(B)(iv) expressly mentions treble-damages suits by trustees appointed by courts in connection with government RICO suits, the definition in Subsection 1964(c)(11) of a "governmental entity" entitled to

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parts; however, Section 2320 has not been re-designated as Section 2321.

sue for treble damages under Subsection 1964(c)(1)(A) does not appear to encompass RICO trustees. The definition of "governmental entity" should be expanded to include RICO trustees and other, similar court-appointed officers.

We express no opinion with respect to several other features of the bill that concern punitive damages for private plaintiffs, particularity of pleading, survivability of actions, and jurisdiction of state courts (new Subsections 1964(c)(2), 1964(c)(4), 1964(c)(8), and 1964(c)(9), and Section 6 of the bill).

In sum, subject to the reservations expressed above, we support enactment of S. 438.

Mr. Chairman, that concludes my prepared remarks. I would be happy to address any questions you or the other Members of the Committee may have.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

SEP 11 1989

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Mr. Chairman:

This is in response to the letter dated June 13, 1989, from Senator DeConcini to Deputy Assistant Attorney General John C. Keeney, submitting additional questions in connection with Mr. Keeney's testimony on civil RICO reform before the Committee on the Judiciary on June 7, 1989. Our responses to these questions are as follows:

1. (a) Question: Would the Department support legislation to detreble all civil RICO cases except where governments are the plaintiff and those that are brought after a conviction for a RICO predicate offense?

Response: We do not oppose this approach, which is quite similar to the approach taken by S. 438. Our main concern with respect to any such bill is that it not damage any important prosecutorial interests of the Department of Justice.

(b) Question: Could the Department support legislation that would repeal civil RICO except for government plaintiffs or after a RICO predicate offense conviction?

Response: Again, we would not oppose such an approach, provided the Department's prosecutorial interests were protected.

(c) Question: Isn't the ability of the Federal Savings and Loan Insurance Corporation (FSLIC) to recover treble damages against fraudulent savings and loans actually enhanced by S. 438?

Response: The ability of the FSLIC to recover treble damages would be enhanced by S. 438 to the extent that the bill would make it clear that a governmental entity can recover treble damages. In this connection, it should be noted that we would prefer that the provision in the bill permitting suits by governmental entities be modified to require that all suits by or on behalf of federal governmental entities be brought or approved by the Attorney General.

2. Question: Does the Department share the view that civil RICO's lure of treble damages and attorneys' fees draws civil plaintiffs like lemmings to the sea? If so, does S. 438 help solve this problem by eliminating automatic treble damages and attorneys' fees in most commercial litigation?

Response: The Department agrees that there has been some degree of abuse of civil RICO by private plaintiffs. We also believe that the approach taken by S. 438 and similar bills would substantially reduce the incentive for such abuse.

3. Question: Does the Department support an amendment to S. 438 to give Indian tribes status as governmental entities entitled to treble damages in civil RICO suits?

Response: In view of the Federal Government's general policy of recognizing Indian tribes as governmental entities for other purposes, we do not object to an amendment to S. 438 permitting Indian tribes to recover treble damages under RICO. However, as noted in our response concerning suits by the FSLIC, above, we would prefer that all suits by federal governmental entities, including Indian tribes, be required to be brought or approved by the Attorney General.

ADDITIONAL QUESTIONS OF SENATOR HUMPHREY

1. (a) Question: Do you consider civil RICO suits against anti-abortion protestors and other protestors an appropriate or permissible use of the RICO civil action?

Response: To date, the only court decision we are aware of in this area is Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3d Cir. 1989). In that case, the Court of Appeals for the Third Circuit upheld the use of civil RICO by a private plaintiff against anti-abortion protestors. However, the court was careful to note that its decision would not permit a suit that infringed on rights protected by the First Amendment. The RICO action was based solely on the deprivation of property rights through intimidation of clinic employees and destruction of medical equipment. Thus, the cause of action was based on the allegation that defendants engaged in the commission of a pattern of felonies; the action was not based on conduct protected by the Constitution. It appears that the courts will draw this line appropriately.

(b) Question: Given the extreme breadth of the RICO statute, and the harsh penalties it imposes, isn't there a real danger that it can be used by both government and private plaintiffs as a means of intimidating and suppressing the exercise of legitimate First Amendment rights?

Response: With respect to actions by federal governmental entities, the Department's strict internal controls will prevent inappropriate uses of the statute. With respect to suits by other plaintiffs, as noted in the previous response, it appears that the courts will be quick to strike down any use of the statute that infringes on legitimate First Amendment rights.

(c) Question: Can you give me any indication from the legislative history of RICO that Congress intended it to be used against persons engaged in demonstrations, protests or other forms of expression unrelated to economic or commercial gain?

Response: Our research indicates that Congress did not address this potential application of RICO, just as it did not address many other applications. However, it is quite clear that Congress did not contemplate the use of RICO against persons exercising legitimate First Amendment rights. To the extent that plaintiffs attempt to use the statute for such a purpose, we have no doubt that the courts will not permit them to do so. It bears mentioning again that, while any suit can be filed, a RICO suit will survive a motion to dismiss only if it alleges that the defendant committed a pattern of serious felonies. By definition, this requirement excludes suits based on conduct protected by the First Amendment.

(d) Question: How would the essential and legitimate purposes of RICO be undercut or compromised if the statute were amended to make it clear that demonstrations, protests, and other forms of First Amendment activity were excluded from the statute's coverage?

Response: Such a provision, in our view, is unnecessary. As indicated in our earlier responses, legitimate activity protected by the First Amendment has been, and will continue to be, excluded from the statute's coverage by the courts. If, despite the lack of need, such a provision were to be enacted, it could easily lead to confusion and added litigation over the new language.

Thank you for this opportunity to provide further information about these important issues.

Sincerely,

Carol T. Crawford

Carol T. Crawford
Assistant Attorney General

Senator DeConcini. Our next panel will be Robert Raven, president of the American Bar Association, and Mr. Steve Twist, chief assistant attorney general of the State of Arizona, on behalf of the National Association of Attorneys General.

Gentlemen, thank you, and we will start with you, Mr. Raven, if you would summarize your statement in 5 minutes, please.

STATEMENT OF A PANEL CONSISTING OF ROBERT D. RAVEN, PRESIDENT, AMERICAN BAR ASSOCIATION, WASHINGTON, DC, ACCOMPANIED BY EDWARD F. MANNINO, SPECIAL RICO COORDINATING COMMITTEE, AMERICAN BAR ASSOCIATION, WASHINGTON, DC; AND STEVEN J. TWIST, CHIEF ASSISTANT ATTORNEY GENERAL, STATE OF ARIZONA, ON BEHALF OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, WASHINGTON, DC

Mr. Raven. Thank you, Mr. Chairman, members of the committee. I appear today in my capacity as president of the American Bar Association, and I have with me someone who is more familiar with all of the details, Edward Mannino, of Philadelphia, who is the section of litigation delegate to the Special RICO Coordinating Committee of the American Bar Association.

As you know, the American Bar Association is a national volunteer organization of 350,000 members. They are private practitioners engaged in every phase of the civil and criminal law—corporate counsel, prosecutors, public defenders, legal services attorneys, professors, and judges from every level of the judicial system.

I am pleased to appear today to testify in support, in principle, of S. 438, a bill to reform civil RICO. In 1970, as part of the Organized Crime Control Act, Congress passed extremely broad racketeering provisions designed to greatly enhance the Government's arsenal for dealing with organized crime—the Racketeer Influenced and Corrupt Organizations Act, or RICO.

While inappropriate use of the RICO statute existed as a possibility when the statute was passed, RICO was little noticed and rarely utilized in the civil area in its first decade.

By 1982, however, it was clear to the ABA that a well-intentioned statute had given rise to needless lawsuits duplicating long-established remedies available under both State and Federal law, and this recognition led the ABA, through its policymaking house of delegates, four times in the 1980's to adopt recommendations for reform of the RICO statute.

These recommendations were brought forward by the ABA section of criminal justice in August 1982, the section of antitrust and business law in 1986, and the standing committee on Federal judicial improvement, also, in 1986.

In response to widespread concern regarding RICO reform within the Association, the ABA created a special coordinating committee on RICO made up of representatives from the concerned sections and committees of the ABA, and charged it with making recommendations to the house on the RICO statute.

It reported to the ABA house of delegates at the 1987 midyear meeting. The house adopted those recommendations which supply the basis for the following comments, and those recommendations are attached to my written testimony.

Our recommendations are premised on the realization that the act's mail and wire fraud provisions permit a reasonably artful advocate to convert virtually any type of commercial dispute involving arguable deceptive statements into a RICO claim.

We believe it is time for Congress to enact civil RICO reform. The U.S. Supreme Court in the *Sedima* decision noted that civil RICO is being used almost solely against legitimate businesses rather than organized crime, and has evolved into, quote, "something quite different from the original concept of its enactors," close quote. That is the *Sedima* case.

The Court, however, held that any correction must be left to Congress. Also, most notably, are the recent extraordinary remarks of the Chief Justice of the United States publicly urging Congress to enact civil RICO reform. The fact that the Chief Justice of the United States rarely speaks out with respect to the need to correct statutes, I think, is important and shows how important the judiciary also feels about this, in addition to the ABA.

The ABA supports limiting the availability of remedies under civil RICO, and while we support S. 438, in principle, we urge that the following changes be included in the final legislation.

First, section 4 of S. 438 would provide for punitive damages of up to twice actual damages for certain claimants. We recommend that the term "additional damages" be substituted for the more inflammatory term "punitive damages," and that a judge rather than a jury determine whether and to what extent such additional damages should be awarded.

As you know, the U.S. Supreme Court is currently considering the question of whether there are constitutional limitations on punitive damage awards in the *Browning-Ferris Industries* case.

The Court may ultimately impose some procedural limitations and, in that context, we believe that leaving the questions to the judge sets a higher due process standard. Judges, unlike individual juries, are able to draw upon a wealth of precedent and experience in assessing whether a particular defendant's conduct was, for example, consciously malicious. The judge's ability to compare the experience in different cases would help further assure uniformity of treatment in assessing additional damages.

We suggest an additional provision to provide that attorney fees be assessed against plaintiffs who do not prevail on the merits in business-to-business suits if plaintiffs' RICO claims are not substantially justified.

There should be some penalty for those civil litigants who continue to institute groundless civil RICO actions. Successful plaintiffs may recover attorney fees under this special remedy. By the same token, civil litigants who abuse this statute should reimburse wronged defendants for their costs and attorney fees.

Third, S. 438 fails to address two key issues on which the lower Federal courts have differed, and that is the interpretation of the words "person" and "enterprise"—those requirements under RICO.

While virtually all of the courts which have considered the question have concluded that the same entity cannot be both the person and the enterprise under section 1962(c), and that only the person can be sued for damages, two further developments in the case law have allowed plaintiffs to avoid that holding. These loopholes are——

Senator **DeConcini**. Mr. Raven, can I ask you to please summarize?

Mr. **Raven**. OK, fine.

Senator **DeConcini**. Thank you, sir.

Mr. **Raven**. Well, I have covered the loopholes very carefully in my written testimony and I think I can—let me go on to the fourth point, conduct.

Section 1962(c) requires proof that the culpable person conduct or participate directly or indirectly in the conduct of an enterprise's affairs. As usual, there has been a split in the courts on that, and we believe that is very important and we think that is an important part of this whole reform.

Antitrust exemption—others have spoken to that. We support in that area.

We appreciate the opportunity to appear here today and we are prepared to answer questions.

Senator **DeConcini**. Mr. Raven, thank you very much for your testimony, and I am sorry to be time conscious, but we have a number of questions, but I appreciate your testimony.

[The prepared statement of Mr. Raven follows:]

AMERICAN BAR ASSOCIATION
GOVERNMENTAL AFFAIRS OFFICE • 1800 M STREET, N.W. • WASHINGTON, D.C. 20036 • (202) 331-2200

Statement of

ROBERT D. RAVEN, PRESIDENT

of the

AMERICAN BAR ASSOCIATION

before the

COMMITTEE ON THE JUDICIARY

of the

UNITED STATES SENATE

concerning

PROPOSED AMENDMENTS TO THE
RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT
(RICO)
S. 438

June 7, 1989

Mr. Chairman and Members of the Committee:

I am Robert D. Raven of San Francisco. I appear today in my capacity as President of the American Bar Association. With me is Edward F. Mannino of Philadelphia, who is the Section of Litigation delegate to the Special RICO Coordinating Committee of the American Bar Association.

The American Bar Association is a national voluntary membership organization representing all segments of the legal profession. Included among our 350,000 members are private practitioners engaged in every phase of civil and criminal law, corporate counsels, prosecutors and public defenders, legal services attorneys, professors, and judges from every level of the judicial system. I am pleased to appear today to testify in support in principle of S. 438, legislation to reform civil RICO.

In 1970, as part of the Organized Crime Control Act, Congress passed extremely broad racketeering provisions designed to greatly enhance the Government's arsenal for dealing with organized crime. Racketeer Influenced and Corrupt Organizations Act, or "RICO," 18 U.S.C.§§ 1961-68. A decade and a half of utilization of the statute in the criminal area made it clear that a well-intentioned statute had given rise to needless lawsuits duplicating long-established remedies available under state and federal law.

In August 1982, the Association's House of Delegates approved recommendations of the Section of Criminal Justice calling for substantive amendments to the criminal provisions of the RICO statute, which are not our focus today.

In August 1986, the Association's House of Delegates adopted resolutions sponsored by the Sections of Antitrust and Business Law recommending amendment of the RICO statute to require a prior conviction of racketeering activity or of a violation of section 1960 of the Organized Crime Control Act as a prerequisite to the filing of a private RICO action.

A second Report approved at the August 1986 meeting sponsored by the Standing Committee on Federal Judicial Improvements urged Congress to limit statutorily the availability in civil cases of the RICO act by amending it to: (1) change the Act's definition of "pattern of racketeering" to require that alleged acts of racketeering be shown to be part of a continuing scheme or plan of criminal activity which must be alleged in wire and mail fraud cases, and reduce to five years the time period in which the alleged acts must have occured, (2) provide for defendants' recovery of costs and attorneys' fees in business-to-business suits frivolously or unreasonably brought, and (3) make applicable to the Act the provisions of Rule 65 of the Federal Rules of Civil Procedure with respect to the granting of injunctive relief.

These resolutions were premised on the realization that the Act's mail and wire fraud provisions permit a reasonably artful advocate to convert virtually any type of commercial dispute involving arguably deceptive statements into a RICO claim. See, e.g., American National Bank & Trust Co. v. Haroco, Inc., 105 S.Ct. 3291 (1985) (claim by corporate borrower that bank lied with regard to prime rate and therefore charged excessive interest on notes where interest was tied to the bank's prime rate). In the securities law area, the decades of legislative and judicial development of private civil remedies are being made obsolete by the easier standard and greater reward of mail and wire fraud based RICO claims. See Sedima, S.P.R.L. v. Imrex Co., 105 S.Ct. 3275, 3295 (1985) (Marshall, J., dissenting) ("Sedima").

There is little ground for quarrel with the Court's recognition in Sedima that civil RICO is being used almost solely against legitimate business rather than organized crime and has evolved "into something quite different from the original conception of its enactors." Sedima at 3287. The Court, however, held that any correction must be left to Congress. Sedima at 3287.

Members of the Judiciary have consistently called for Congressional reform of civil RICO. Perhaps most notable are the recent, extraordinary remarks of Chief Justice William Rehnquist this year before the ABA Midyear Meeting in February and in April at the Brookings Institute publicly urging

Congress to enact civil RICO reform now so that the statute addresses itself to organized crime as Congress originally intended. Inappropriate uses of the RICO statute existed as a possibility when the statute was passed, but RICO was little noticed and rarely utilized in its first decade. A widely noted ABA 1985 survey of judicial decisions involving RICO through 1984 found only 3 percent of such decisions then reported had been handed down prior to 1980.

The explosive increase in private civil RICO suit decisions is illustrated by the sharply escalating percentages in the latter years of the ABA survey. Of all RICO trial court decisions since the statute's inception through 1984, 3 percent were decided prior to 1980, 2 percent in 1980, 7 percent in 1981, 13 percent in 1982, 33 percent in 1983, and 43 percent in 1984. The Administrative Office of the U.S. Courts has documented the continuing increase in civil RICO filings, showing a rise from 614 filings in 1986 - the first year it tracked RICO cases - to 1095 cases in 1987 and 959 cases in 1988. Moreover, it was suggested by Professor Gerard Lynch of Columbia University at a House Judiciary Subcommittee on Crime hearing last month that current RICO statistics seriously underestimate actual case volume: because the federal reporting form contemplates only single-count pleadings, and RICO counts are usually secondarily pled, the current statistic understates the actual number of cases involving a RICO count by an estimated factor of six.

This increase in civil RICO filings has occurred in the face of hostility by the courts which crafted interpretations of RICO that would stem the federalization of ordinary commercial disputes and the erosion of long-crafted standards for antitrust and securities remedies.

In response to widespread concern regarding RICO reform within the Association, the ABA created a Special Coordinating Committee on RICO in 1986. The Special RICO Coordinating Committee was appointed by Eugene Thomas, then President of the ABA, and was made up of representatives of interested Committees and Sections of the ABA. These included representatives from the Standing Committee on Federal Judicial Improvements and the following Sections: Business Law; Litigation; Tort and Insurance Practice; Antitrust Law; Patent, Trademark and Copyright Law; and Criminal Justice. This Committee was charged to carefully investigate legislative proposals to amend RICO and to recomend a course of action for the ABA.

The Coordinating Committee reported its recommendations to the ABA House of Delegates at the 1987 Mid-Year Meeting. The House adopted the recommendations which supply the basis for the following comments.*

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* The Recommendations of the Special RICO Coordinating Committee adopted February, 1987 by the American Bar Association House of Delegates are attached as an Appendix. (Cont.)

RICO has been an expansive and controversial federal statute which has aroused great debate among courts, litigants, and commentators. While most knowledgeable and concerned observers have suggested amending RICO, agreement has not yet been reached as to the scope of appropriate change or clarification of the existing legislation. While the ABA supports S. 438 in principle, it urges that the following changes be included in the final legislation:

1. Additional Damages

Section 4 of S. 438 would provide for punitive damages of up to twice actual damages for certain claimants, based upon a showing by clear and convincing evidence that the defendant's actions were "consciously malicious, or so egregious and deliberate that malice may be implied."

We recommend that the term "additional damages" be substituted for the more inflammatory term "punitive damages," and that a judge, rather than a jury, determine whether and to what extent such additional damages should be awarded.

(Cont. from previous page). The Recommendation relating to the pleading with particularity of facts supporting the claim against each RICO defendant has been substantially implemented in proposed section 1964(c)(8) of S. 438. A Recommendation adopted April, 1988 by the ABA Board of Governors to eliminate treble damage availability under civil RICO provisions for actions covered by state or federal commodity laws is implemented by proposed section 4(c)(2)(B)(iii)(II).

The U.S. Supreme Court is currently considering the question whether there are constitutional limitations on punitive damage awards. Browning-Ferris Industries of Vermont Inc. v. Kelco Disposal Inc., 88-556. The Court may ultimately impose some procedural limitations and in that context we believe that leaving this question to the judge sets a higher due process standard. Judges, unlike individual juries, are able to draw upon a wealth of precedent and experience in assessing whether a particular defendant's conduct was, for example, "consciously malicious." The judge's ability to compare the experience in different cases would help further assure uniformity of treatment in assessing additional damages.

2. Attorneys' Fees.

We suggest an additional new provision to provide that attorneys' fees be assessed against plaintiffs who do not prevail on the merits in business-to-business suits if plaintiff's RICO claims are not "substantially justified."

There should be some penalty for those civil litigants who continue to institute groundless civil RICO actions. Successful plaintiffs may recover attorneys' fees under this special remedy; by the same token, civil litigants who abuse this statute should reimburse wronged defendants for their costs and attorneys' fees.

3. Statute of Limitations

We support a three-year limitations period tied to the time a cause of action arises, but suggest that after a criminal conviction a one-year period be permitted to commence a suit otherwise time-barred. Proposed section 1964(c)(4) would establish a uniform civil statute of limitations commencing after the latest of (a) four years after the cause of action accrues or the conduct causing injury to the plaintiff terminates, and (b) two years after the date of any criminal conviction giving rise to treble damages. This statute of limitations would codify the judicially-created four-year statute of limitations borrowed from the Clayton Act by the Supreme Court in Agency Holding Corp. v. Malley-Duff Association, Inc., 94 L.Ed 2d 683; 55 U.S.L.W. 3606; 107 S.Ct. 1366 (1987).

We believe the shorter period is fair because proposed section 1964(c)(4)(B) suspends the running of the statute of limitations during the pendency of a government civil action or criminal case relating to the same conduct. We recommend that a further provision be added to this section to clarify that a conviction does not become final until after all appellate remedies are exhausted, so as not to encourage the filing of civil suits based upon a criminal conviction in the trial court which may later be reversed on appeal.

4. "Person" and "Enterprise" Amendments

S. 438 fails to address two key issues on which the lower federal courts have differed: the interpretation of the "person" and "enterprise" requirements under RICO.

Virtually all of the courts which have considered the question have concluded that the same entity cannot be both the "person" and the "enterprise" under section 1962(c), and that only the "person" can be sued for damages.*

While the courts have reached almost a unanimous judgment on this issue, there have been two further developments in the case law which have allowed plaintiffs to avoid the holding that enterprises may not be sued for damages. These loopholes are, first, the treatment of affiliated entities as separate persons and enterprises, and second, the application of ordinary principles of agency or respondeat superior to permit a plaintiff to collect against the "enterprise" for the acts of the "person" it employs or with which the "person" is associated. It is recommended that S. 438 be amended to (1) unambiguously require truly separate and non-affiliated entities to satisfy the person/enterprise duality, and (2) preclude the application of agency and respondeat superior doctrines to permit collection of a judgment from an enterprise.*

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* See, e.g., Bennett v. United States Trust Co., 770 F.2d 308 (2d Cir. 1985), cert. denied, 106 S.Ct. 800 (1986); B.F. Hirsch v. Enright Refining Co., Inc., 751 F.2d 628 (3d Cir. 1984).

If the proposed amendments are incorporated, single firm wrongdoing such as that now routinely attacked under RICO in such areas as prime rate computations by banks, churning by securities brokers, and single firm monopoly or predatory pricing would be insulated from the application of RICO for lack of the required two entities which RICO clearly contemplated.

5. "Conduct" Amendment

Section 1962(c) requires proof that the culpable person "conduct or ... participate, directly or indirectly in the conduct of [an] enterprise's affairs." As with most RICO issues, the proper interpretation of this conduct requirement has split the courts which have considered it. Some courts require satisfaction only of a nexus test, under which conduct "simply means the performance of activities necessary or helpful to the operation of the enterprise."

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* See the well-reasoned opinion in Schofield v. First Commodity Corp., 793 F.2d 28 (1st Cir. 1986).

Under this overly broad approach, banks lending to an unaffiliated enterprise, and accountants auditing a client have been brought within the statute's purview.*

We believe the better view is that the conduct element requires some policy-making power over the affairs of the enterprise by the defendant, an approach which would insulate accountants and bankers from RICO liability in most cases of ordinary audits or loans. Many courts have held that this is the appropriate test,** and we believe that the goal of S. 438 -- to eliminate unfounded RICO suits -- would be significantly advanced if this amendment were made.

While the exact parameters of this test would require some judicial development, many parallels already exist in such areas as the control liability of banks over borrowers and the control provisions of the federal securities laws. It is suggested that RICO's underlying legislative concern over criminal infiltration of an innocent enterprise requires this narrow construction rather than the liberal nexus standard, which could apply to any third party whose activity facilitates an illegal act, rather than limiting the coverage to one who causes its commission.

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* See, e.g., Sun Savings & Loan Association v. Dierdorff, 825 F.2d 187 (9th Cir. 1987); Bank of America National Trust & Savings Association v. Touche Ross & Co., Inc., 782 F.2d 906 (11th Cir. 1986); Virden v. Graphics One, 623 F.2d 1417 (C.D. Cal. 1985).

** See, e.g., Bennett v. Berg, 710 F.2d 1361, 1364 (8th Cir.) (en banc), cert. denied, 464 U.S. 1008 (1983); Plains/Anadarko-P Limited Partnership v. Coopers & Lybrand, 658 F. Supp. 238 (S.D.N.Y. 1987); Agristor Leasing v. Meuli, 634 F. Supp. 1208 (D. Kan. 1986); Hunt v. Weatherbee, 626 F. Supp. 1097 (D. Mass. 1986).

6. Antitrust Exemption

Subject to certain exceptions, S. 438 exempts from the possible award of punitive damages activities for which an express or implied remedy is available under either state or federal securities laws. This approach recognizes that the securities laws provide a comprehensive regulatory approach reflecting careful legislative judgments incorporated in amendments to these statutes over the last fifty years, as well as a significant volume of case law in both state and federal courts during much of that period.

The same considerations that militate in favor of not permitting additional damages where an express or implied remedy is available under state or federal securities laws militate in favor of excluding such damages in the case of the antitrust laws. Like the securities laws, the antitrust laws are a carefully crafted set of remedies which are designed to foster competition, and which have evolved over an even longer period. There should not be an inducement to displace this well-considered and comprehensive approach by permitting RICO suits aimed at behavior which falls within the ambit of the antitrust laws.

* * *

Mr. Chairman, the ABA appreciates this opportunity to appear before you today to express our views on the pending RICO legislation.

We will be happy to answer any questions you may have.

* * *

Appendix - American Bar Association RICO Coordinating Committee Recommendations To The ABA House of Delegates

Appendix

SUMMARY OF ACTION TAKEN BY THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION

J. Michael McWilliams, Chairman, Presiding
New Orleans, Louisiana, February 16–17, 1987

RICO Coordinating Committee (Report No. 301)

The Committee's recommendation was approved by voice vote. It reads:

Be It Resolved, That the American Bar Association endorses in principle H.R. 5445, as passed by the U.S. House of Representatives, 99th Congress, and similar legislation, to amend the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. sections 1961-68, to limit the availability of a private civil RICO action under the Act and urges inclusion of the following amendments:

1. *Additional Damages*. (a) Substitute the term "additional damages" for the term "punitive damages," (b) provide that the judge, rather than the jury, shall determine whether additional damages are appropriate and in what amount, and (c) delete the "equitable factor" from the list of factors that are to be considered in determining the amount of additional damages.
2. *Attorneys' Fees*. Provide that, in business versus business suits, that reasonable attorneys' fees be awarded to a defendant prevailing on the merits of a civil RICO claim if plaintiff's RICO claims are not "substantially justified."
3. *Pleading*. Delete language amending the Federal Rules of Civil Procedure relating to particularity of pleading. A requirement for particularity should be incorporated in the RICO statute itself.
4. *Statute of Limitations*. Provide that a civil RICO action cannot be brought after the latest of (1) three years after the date the cause of action accrues or (2) one year after the date of conviction of the defendant of a predicate act or of a RICO criminal prosecution.
5. *"Person" and "Enterprise" Amendments*. Amend 18 U.S.C. 1962 to:
   - a. Provide that a "person" (1) be a different entity than the "enterprise" under that section, and (2) not be part of an affiliated group whose membership also includes the "enterprise."
   - b. Remove the "enterprise" from liability for treble damages or injunctive relief under the civil provisions of RICO either directly or through the application of principles of agency, respondeat superior, or similar doctrines.
6. *"Conduct" Amendment*. Amend 18 U.S.C. 1962 (c) to provide that a person may be found to have "conducted" an enterprise's affairs only when such person has actively participated in the operation or management of the enterprise itself.
7. *"Antitrust" Amendment*. Amend proposed new 18 U.S.C. 1964 (c)(2)(B)(ii)(II) by adding "or antitrust" immediately after "securities."

Senator DECONCINI. Mr. Twist, we are very pleased to welcome you here from the sunny State of Arizona. As you can see, we need a little bit of that here. Please proceed.

STATEMENT OF STEVEN J. TWIST, CHIEF ASSISTANT ATTORNEY GENERAL, STATE OF ARIZONA, ON BEHALF OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, WASHINGTON, DC

Mr. TWIST. Thank you very much, Mr. Chairman, members of the committee. My name is Steve Twist and I am the chief assistant attorney general for the State of Arizona. I am very grateful to have been invited again to present the views of the National Association of Attorneys General to this committee on the subject of RICO reform.

Mr. Chairman, if you will permit me a personal comment at the outset, but one I believe which fairly expresses the views of State and local prosecutors around this country, I would like to express to you, frankly, my appreciation for the support that you have given to the local and State crime control efforts in this country, and State and local law enforcement.

As a former prosecutor, I know that you come by those views naturally and that they are heartfelt. Indeed, over the last decade, you and this committee have supported bipartisan initiatives coming both from the Congress and the administration to strengthen Federal efforts to become a meaningful and working partner in local efforts to fight crime, and also to protect victims. In that, we thank you. Much remains to be done, to be sure, but this committee, I think, and the Congress as a whole can be justly proud of the bipartisan progress that you have made.

That effort, I believe, over the last decade has been guided by two clear strains or themes; first, that the crime rates in this country are intolerably high and that we cannot long sustain a free, civil society if we suffer under these crime rates much longer; and, second, and I believe just as importantly, that the rights of victims of crime have for too long been ignored in our system of justice, and that law-abiding victims deserve effective remedies for the pain and the loss that they suffer.

Those themes, I submit, are no less true when applied to the threat of criminal fraud and other forms of organized crime and racketeering which threaten our free market. RICO, I believe, stands today at the center of this country's effort, and indeed at the center of the ability of victims in fraud in this country, to preserve and protect the honesty and the integrity of our free market.

There is simply not time today to detail all the dimensions of that problem, but just think back to the headlines—procurement fraud, insider trading, fraud in the disposal of toxic wastes, money laundering, insurance fraud, pension fund fraud, fraudulent appraisal practices, to name but a few.

They are literally—and from the perspective of one in the State trenches in the fight against white collar crime, I believe I can say with some certainty that those problems literally are ravaging the marketplace in this country. I know that it is true in the jurisdiction that I come from.

They also demonstrate—the level of that crime demonstrates a dispiriting ineffectiveness of the Government and its resources alone to do the job without help from the private sector, which I think brings us to the point of specifically Senate bill 438 and its proposals to change and, in my judgment, in some measure, emasculate the right of private victims, upon whom we in the Government must rely for effectiveness enforcement to bring causes of action to remedy their victimization.

It seems that the legislation before you is prompted by two concerns, and these concerns are echoed throughout most of the testimony and most of the public debate about this issue; first, that civil RICO is being abused, that it is being used as a bludgeon to force defendants in an otherwise so-called garden-variety commercial dispute or garden-variety contract dispute into a settlement; and, second, that the intrusion of Federal law and the Federal courts in this context is inappropriate, and that these matters are best left to the States.

With those two concerns in mind, and while we recognize their importance, I think it is clear, in our judgment and the judgment of the national association, that Senate 438 does not provide the best possible response to those concerns.

First, with regard to the garden-variety commercial dispute issue, such a characterization is both, in my judgment, technically unsound and one which trivializes the real nature of criminal fraud in this country.

While the characterization may serve rhetorically to further the cause of RICO's opponents, it does nothing to further informed public debate on the issue.

On the technical side, as the circuit courts around this country are making abundantly clear, RICO does not apply to isolated acts, and the Supreme Court is expected shortly to confirm these decisions.

Because none of RICO's fraud predicate offenses are applicable absent a showing a criminal intent, it is simply untrue that every type of contract dispute could be turned into a RICO case.

The elements of criminal fraud must be proven if, in fact, these elements are present. And if, in fact, those elements are present in every contract dispute, as some have said, if RICO didn't exist we would be forced to invent it.

Unfortunately, what we do have in America is a massive onslaught of criminal fraud. Every successful RICO claim requires criminal conduct, and I would commend to this committee's attention to the testimony of Professor Lynch before the House subcommittee on the House counterpart of this legislation.

Although not a proponent of the views that I am expressing right now, I think he made it clear in his testimony that every successful civil RICO case must be based on an underlying criminal conduct.

In fact, there must be a series of predicate criminal acts under the pattern requirement. A simple dispute over the terms of a contract do not involve elements of criminal fraud. Indeed, a case that involves intentional misrepresentation, material omission, or other elements of criminal fraud should not be considered a garden-variety contract dispute unless such fraud is business as usual in this country, which I do not believe.

Perhaps a narrower and clearer definition of the pattern requirement, which, again, I believe we are going to see out of the Supreme Court in the near future, will be a more appropriate solution.

Now, turning to the question of whether these cases are appropriate for Federal jurisdiction——

Senator DECONCINI. Mr. Twist, let me ask you to try to summarize, if you can, due to our time constraints.

Mr. TWIST. Yes, sir, Mr. Chairman.

It might seem unusual for a State prosecutor to come before this committee and urge that there be a Federal forum. Indeed, perhaps the positions that have been taken by State and local prosecutors in the past on other issues have urged caution to the Federal Government in getting involved in what traditionally have been State and local matters.

The simple fact of the matter is that the State resources that are currently available, the Government resources that are currently available, are not effective and not adequate to deal with the problem. The State court resources are not adequate to deal with the problem, and denying a Federal forum to victims of criminal fraud will, in fact, deny many victims the opportunity to seek redress.

Mr. Chairman, my statement points out that there are, we think, eight serious problems with Senate bill 438. I commend those problems to your attention. The National Association of Attorneys General looks forward in great earnest to sitting down with you and members of your staff and members of the staff of this committee to try to work out a compromise where both sides can achieve some meaningful reform. We are not against reform, but we do believe that this particular reform will emasculate for victims of criminal fraud a very needed remedy right now.

Thank you very much.

Senator DECONCINI. Mr. Twist, thank you. I am sorry that our time restrains you from continuing. Your full statement will appear in the record.

[The prepared statement of Mr. Twist follows:]

STATEMENT

OF

STEVEN J. TWIST
CHIEF ASSISTANT ATTORNEY GENERAL
ARIZONA ATTORNEY GENERAL'S OFFICE

ON BEHALF OF

THE

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

BEFORE

THE

COMMITTEE ON THE JUDICIARY

OF THE

UNITED STATES SENATE

CONCERNING

S. 438 -- THE RICO REFORM ACT OF 1989

ON

June 7, 1989

Mr. Chairman and Members of the Subcommittee, my name is Steve Twist. I serve as the Chief Assistant Attorney General for the State of Arizona. Among other responsibilities, I supervise the Attorney General's civil and criminal state RICO enforcement effort. I serve on the Criminal Justice Council of the American Bar Association and am a member of the American Bar Association's RICO Cases Committee and its Victims Committee. I helped organize the RICO subcommittee of the National Association of Attorneys General and have assisted in the establishment of state RICO enforcement programs in several states.

I am honored to have been invited to join your panel of witnesses today and present the views of the National Association of Attorneys General on RICO and the provisions of S. 438 which propose to amend it. Attached to this statement are the formally adopted positions of the National Association of Attorneys General on RICO and proposals to modify it and, I would respectfully ask that this statement, along with the attachment, be included in the formal record of these proceedings.

During the course of this decade the United States Senate has acted forcefully to assist the crime control efforts of state and local governments. This bipartisan effort has been guided by two clear themes. First, and fundamentally, that a free civil society cannot long endure the intolerably high crime rates we are experiencing. Second, and just as importantly, that the rights of victims of crime have too long been ignored in our system of justice and that law-abiding victims deserve effective remedies for the pain and loss which they suffer.

These themes are no less true when applied to the threat of criminal fraud and other forms of organized crime and racketeering which threaten our free market. RICO stands at the very center of this country's efforts to control criminal enterprise fraud; it is the single best weapon yet developed to preserve and protect the integrity and honesty of our free market.

The effectiveness of RICO as a criminal tool and as a civil cause of action in the hands of government plaintiffs is not questioned by this proposed legislation S. 438. The fundamental RICO goal that is being questioned in this legislation is the goal of legislatively authorizing private victims to bring judicial power to bear on specific and serious anti-social conduct in such a way that courts can effectively prevent or remedy the conduct, while minimizing the potential for abuse. This goal is particularly elusive in the area of fraud, an area in which allegations are easily made, facts are often complex, and mounting a defense may be costly regardless of guilt or innocence. We all recognize that in an increasingly interdependent national and world economic structure, misallocation of resources based on fraud is a growing concern. The traditional deterrents of fraud -- business reputation, religious values, reluctance to face being shamed in the eyes of one's family, neighbors and peers -- are reduced by increasing mobility and anonymity. We are reminded of the results daily. As you know, the General Accounting Office recently concluded that the savings and loan crisis was caused in large part by fraud, not by deregulation or poor economic conditions. The estimated losses: $100 to $150 billion. The FBI currently has 8,000 pending financial institution matters in which the alleged crimes were committed by officers or directors of the financial institution. Well over half of these cases involve losses of over $100,000. Procurement fraud, insider trading, fraud in the disposal of toxic wastes, money laundering, insurance fraud, pension fund fraud, and fraudulent appraisal practices, to name but a few categories, are ravaging our marketplace at levels which demonstrate a dispiriting ineffectiveness of government resources alone to do the job without help from the private sector. Many of these victimizations occur daily, and are the regular docket material of the state courts across the country. If RICO did not exist today, we would be faced with the job of inventing it.

The enactment of state RICO statutes in more than half of all the states attests to the effectiveness of RICO's basic concepts and approach. State legislatures have continued to enact RICO statutes even after RICO has come under attack. Several reasons may be cited for this local legislative support. To be sure, the dire predictions of a flood of civil litigation have failed to materialize (in fact, federal civil RICO filings declined 12% in 1987-1988 and never amounted to over 1/2 of 1% of federal civil cases filed), and judicial discretion has been used to limit RICO abuse. Perhaps most importantly, there has been a recognition that abuses by a few litigants do not justify denying legitimate victims their day in court.

State uses of civil RICO have grown, both in their numbers and in their effectiveness. The financial underpinnings of drug trafficking are increasingly seen as a vulnerable area of the burgeoning drug industry, and the states are relying heavily on civil RICO in their efforts to combat the largest drug enterprises. Civil RICO also remains a cornerstone of any effective strategy to combat fraud.

With a strong federal RICO, and with the state RICOs now enacted or being considered by states all across America, the federal government, the states, and the legitimate business community can forge a powerful alliance for integrity in the market, even as an earlier generation of Americans forged, with the antitrust laws, a similar public/private alliance to ensure open competition in the market. Without such an alliance, which must include the private market, we cannot begin to control the fraud which threatens us.

The National Association of Attorneys General recognizes that enforcement of anti-fraud provisions, even though designed to free the legitimate economy from misallocation of resources, has unavoidable economic costs. The charge has been made that private civil RICO enforcement may be so costly or so unpredictable that its good effects are offset by the economic costs of the enforcement itself. The charge, however, has not been substantiated. Yet, if civil RICO is to be reformed, its reform should be crafted with this balance as the central point of reference.

Many changes proposed by S. 438 seem to be prompted by two specific concerns with the current law. The first is that civil RICO is being abused -- used as a bludgeon to force defendants in an otherwise "garden variety" contract dispute into a settlement. The second concern is that the intrusion of federal law and the federal courts into this context is inappropriate. While these concerns are important and must be addressed, to the extent that problems exist within the present law, S. 438 is not the best possible response.

Better and more narrowly tailored procedural remedies are available to combat possible abuse than the proposed substantive changes reflected in S. 438. If plaintiffs and their attorneys in fact are attempting to abuse RICO as an unfair bargaining tool, strengthening pleading requirements and sanctions against frivolous complaints is a more finely tailored response than eliminating or curtailing a legitimate victim's remedies and access to the courts.

RICO currently includes one substantive bar to this kind of abuse, because every successful RICO claim requires criminal conduct. In fact, there must be a series of predicate criminal acts under the pattern requirement. A simple dispute over the terms of a contract should not involve, for example, elements of criminal fraud. Indeed, a case that involves intentional misrepresentation, material omission, and the other elements of criminal fraud should not be considered a "garden variety" contract dispute, unless such fraud has become "business as usual" in this country. Alternatively, if the definition of fraud is believed to be too broad in the RICO context, a narrower and clearer definition of the pattern requirement in civil fraud cases would be a more appropriate solution.

The concern about the use of federal law and federal courts in these matters is not new. A very similar debate occurred in the 1930's when the Congress enacted the securities laws. It was argued then that state laws and notions of state common law jurisprudence were adequate to deal with problems that were then afflicting the securities markets.

Indeed, there was a tremendous outpouring of opposition, aimed at the repeal or modification of the securities act. It was suggested that the legislation was so Draconian that "it would dry up the nation's underwriting business and that grass would grow on Wall Street."

Justice Frankfurter, who was then a professor, made this observation:

> The leading financial law firms who have been systematically carrying on a campaign against the Securities Act of 1933 have been seeking, now that they and their financial clients have come out of their storm cellars of fear, not to improve, but to chloroform the Act. They evidently assumed that the public is unaware of the sources of the issues that represent the boldest abuses of fiduciary responsibility.

History is repeating itself in the context of RICO. Some of the provisions of S. 438 are attempts to do what I believe Justice Frankfurter would have characterized as attempts to "chloroform the Act."

In fact, state resources are not adequate. Congress recognized that when it enacted the securities laws. I believe that implicit in RICO is a recognition that state resources and state jurisprudence are insufficient to deal with the problem of fraud in this country. In the Arizona Attorney General's office alone, we have reports daily and thousands of complaints annually from people who have legitimate reports of cases of fraud, from simple consumer fraud complaints to massive complaints of securities, commodities, and other kinds of investment fraud.

The resources of government are not and never will be sufficient to deal with the problem. That is why RICO stands at the center of this country's effort to preserve the integrity of our marketplace. It allows victims -- the focus of all our recent crime legislation -- to have a private remedy under which they can be their own private attorney general and go through the courts to seek redress for their grievances. Limiting the availability of a forum for these victims, by making RICO exclusively a federal or exclusively a state matter, would effectively deny any remedy whatsoever to some victims.

First, although many states do have their own RICO statutes, often patterned after the federal RICO provisions, not all states do. Victims in states that have no RICO law must rely on the federal law to provide a remedy. In the absence of a federal law, perhaps more states would enact their own RICO legislation, but until those laws took effect, victims of fraud would be left without an effective remedy.

Second, while state RICO laws are patterned after the federal provisions, the state provisions might be narrower than the federal law. Federal and state legislation, taken together, close the loopholes.

Finally, systemic fraud in such areas as pensions funds, savings and loan and insurance is a proper subject for federal concern.

While not all civil RICO cases touch upon these specific federal concerns, it is important to note that, of the eighty-five civil RICO cases filed each month, on average, federal jurisdiction would exist in sixty percent even without the presence of the RICO cause of action. To the degree that there is a national economy to justify the federal concern in antitrust actions, there is justification for federal concern in civil RICO actions. This concern cannot be left to the states alone.

The National Association of Attorneys General supports constructive re-design of civil RICO. It specifically supports some portions of S. 438. It must strongly oppose a number of provisions of S. 438, however, and would propose several additions to it as well.

Several features of S. 438 merit commendation. First, the specific preponderance of the evidence provision, though a statement of present law, is useful. Second, the addition of new predicate offenses is well done. The National Association of Attorneys General agrees with the Department of Justice's comments on prior RICO reform bills that Congress should update and strengthen the predicates without diluting them. The Association is particularly pleased to see drug offenses in the definition of "crime of violence," because they surely are crimes dependent upon and leading to violence. The Attorneys General would suggest the addition of a limited class of serious environmental crimes. Knowing violation of statutes resulting in serious or life-endangering environmental damage in pursuit of higher profits is conduct that must be sanctioned as racketeering. Third, the provision for international service of process recognizes the reality of world finances and resulting world-wide asset concealment. It will be particularly useful in government drug cases. Finally, we can agree that limiting the use of the terms "racketeer" and "organized crime" to allegations of crimes of violence will reflect an appreciation for the effect such descriptions have and properly reserve their use to those acts which are most deserving of such denunciation.

Unfortunately, analysis of S. 438 reveals that it offers eight reforms which will significantly weaken RICO's effectiveness and, as a consequence, cause damage to innocent victims. First, the draft legislation reduces recovery from treble damages to actual damages for Indian tribes, labor unions, businesses, non-profit organizations and individuals other than consumers who have been victimized by patterns of criminal conduct. The obvious result, or purpose, of this provision is to reduce by two-thirds the liability of defendants guilty of illicit activities. This reduction is even more drastic than the parallel provision of last year's H.R. 4923, which would have allowed businesses and individuals to obtain attorneys' fees. Elimination of treble damages for criminal frauds emasculates the promise which RICO holds out to innocent victims: that the law will provide an effective remedy regardless of their status.

Moreover, in the absence of a criminal conviction, the draft legislation would bar the award of costs, attorneys' fees, and punitive damages, unless the victim has the proper combination of personal characteristics and injuries. When Justice Brennan compiled a list of 119 federal fee shifting statutes in Marek v. Chesny, 105 S. Ct. 3012, 3034-38 (1985) (Brennan, J., dissenting), 18 U.S.C. § 1964(c) allowed any prevailing victim to recover costs and attorney's fees. Under S. 438, however, only the narrowly-defined category of "governmental entity" is entitled to attorneys' fees and costs in every case. For example, Indian tribes and tribal governments are not within the scope of the definition. As a result, no matter how egregious or malicious the fraud, tribal governments would be limited to actual damages only, because punitive damages are available only to those who may receive costs. The same situation exists for any organization which is neither suing for insider trading nor a 501(c)(3) exempt organization, an indenture trustee, a pension fund, or an investment company. Even natural persons are limited to actual damages if any state or federal securities or commodities law provides a remedy. In effect, this provision creates two classes of victims: those who are entitled to something more than actual damages and those who are not.

Second, the draft legislation will allow consumers to sue for punitive damages of up to twice actual damages, plus attorneys' fees. The drafting is both conceptually unsound and technically flawed. Not only does the bill place unreasonable burdens on victimized consumers seeking punitive damages, but, more unfortunately, the whole concept of a cap on "punitive" damages is self-defeating, if not deceptive. Punitive damages must necessarily be calculated, in part, on the level of award which would in fact punish a guilty party. This requires some consideration of the defendant's net worth, not simply the victims' loss. Moreover, the requirement that the consumer prove "the defendant's actions were consciously malicious or so egregious and deliberate that malice may be implied . . ." erects a very substantial hurdle. Beyond this daunting hurdle lies a morass of judicial uncertainty over the meaning of these words. Read literally, the bill could prohibit the plaintiff from introducing evidence of the defendant's malice in the case in chief. Surely the drafters could not have intended such an unfair or unparalleled result.

In addition, double punitive damages simply will be less effective. Court dockets will be needlessly strained because punitive damages will generally require a second round of litigation, a round that will examine the defendant in greater depth and cause greater acrimony among business adversaries. Punitive damages are unpredictable. A plaintiff will not be able to evaluate his case as objectively in advance, and neither party will be as able to predict judgments in order to settle. Furthermore, plaintiffs simply may add a separate non-RICO punitive damages claim to the case, not limited to double damages. Allowing treble damages and prohibiting additional punitive damages to be sought in the same case would seem to be a more cost-effective method.

No valid reason exists for unreasonably raising the consumer's burden of proof from "preponderance of the evidence" to "clear and convincing evidence," especially when the main liability is proven by a "preponderance of the evidence." The Supreme Court has ruled that a higher standard for proving fraudulent conduct is not demanded of private litigants and that any standard higher than "[preponderance of the evidence] expresses a preference for one side's interest." Herman & MacLean v. Huddleston, 103 S. Ct. 683, 691 (1983) (relating to the fraud provision of the Securities and Exchange Act of 1934). Requiring consumer victims to prove damages in a second proceeding after liability is already established further adds time and expense to the victim for an already proven claim.

Third, exclusive federal jurisdiction is unwise. The argument, often repeated in support of RICO reform, that federal courts are inappropriate forums for general fraud actions would certainly support concurrent state jurisdiction. More to the point, a national cause of action should be available in state courts, as well as federal courts, where there are state resources available to help accomplish the broad RICO mission. The limitation of RICO cases to federal courts may benefit a national "RICO Bar", but only at the expense of thousands of victims who should be able to turn to the state courts of this nation for a forum to redress their grievances. If general concurrent jurisdiction is not provided for, the bill should at least provide for concurrent jurisdiction over suits by a "governmental entity," as defined in proposed § 1964(c)(11)(A). However, there is no legitimate reason to disadvantage any victims by preventing their access to state courts under RICO.

Concurrent jurisdiction ensures that neither the federal nor the state judiciary must bear the full impact of RICO litigation alone. RICO litigation cannot be characterized as completely intrastate or completely interstate. With concurrent jurisdiction, the parties may choose the forum which better suits the circumstances and requirements of the litigation. Purely local controversies may be brought in the state courts, while interstate or international controversies will have a federal forum and the Federal Rules of Civil Procedure available. Defendants have the option of removal to a federal court if they believe that is to their advantage.

Fourth, S. 438 bars even consumers from receiving multiple damages when "state or federal securities or commodities laws" provide a remedy. Practically, violators of the securities or commodities laws will be liable to victims for only actual damages. Once again, this legislation drastically reduces the risks involved in criminal conduct and therefore reduces the deterrent effect of RICO. It is fundamentally unfair and unwise to exempt specific industries from legislation that champions broad social justice goals. There is no rational basis for these exemptions; an examination of the recent criminal fraud case filings would no doubt support the conclusion that these industries are, if anything, deserving of less exemption from RICO rather than more. This proposal is, in fact, a shocking betrayal of victims of securities or commodities fraud.

Fifth, S. 438 will allow treble damages if the primary defendant has been convicted of a felony "based upon the same conduct upon which the plaintiff's civil action is based." But to condition a victim's right to recovery on whether the government has filed a prior criminal case and achieved a conviction would be unprecedented in American jurisprudence. A matter completely unrelated to the merits of the victim's claims would determine whether the victim could recover damages. This provision would leave legitimate victims to the vagaries of the criminal justice system and put inappropriate political pressure on a prosecutor's decision to prosecute, as well as on the victim's own testimony at the criminal trial.

Indeed, the impeachment value of such a requirement would be a boon to defense attorneys in criminal actions. The rationale for this limitation is that non-meritorious suits are eliminated by interposing the prosecutor's discretion between the defendant and the civil plaintiff. This rationale is faulty. Prosecutors' discretion is unfortunately often guided by resources first, then the merits. Many large fraud cases are declined precisely because the victim is in a position to sue. Further, a prosecutor may discontinue prosecution for reasons unrelated to the merits. Defendants who become state's witnesses, who leave the jurisdiction, who die or who are too sick or mentally incompetent for criminal remedies to be appropriate, or who succeed in suppressing evidence on constitutional grounds, may still be, and frequently are, proper civil defendants. Because the goals of the criminal prosecutor -- punishment and specific and general deterrence -- are not the same as the goals of the victim -- restoration of loss -- the discretion of the prosecutor is not a substitute for the judgment or self-restraint of a civil plaintiff. Cases in which the defendant would likely receive light criminal sanctions, i.e., little or no jail, may be plea bargained to a misdemeanor or not brought.

The effects of a prior criminal conviction requirement on group liability would often be unjust and even bizarre. If one unconvicted person is a necessary party to the civil action, does the entire action fail for lack of joinder? If a clearly culpable "deep pocket" defendant has escaped felony conviction, for a non-merit related reason, are the codefendants to bear the missing codefendant's financial responsibility to the victims without right of contribution? These problems recur in the areas of counter-claims and third party complaints, and in each instance the victims will suffer further complexity, delays, and inability to reach the culpable defendant. The superficial appeal of this approach is unfortunate evidence in support of the old saw that defines "legal reasoning" as reasoning from a false analogy.

The sixth feature of S. 438 which significantly weakens RICO's effectiveness authorizes procedural delays for regulated industries. It allows all regulated industries to claim as an "affirmative defense" that they "acted in good faith and in reliance upon" the decisions of a federal or state agency. Plaintiffs would have to disprove this affirmative defense before the discovery proceedings could begin. This provision would be especially harmful in those cases in which there is great need for speedy marshalling of assets to protect them from dissipation. Government and trustee civil RICO cases commonly require such rapid action on behalf of victims or because of the nature of the defendants (e.g., foreign drug traffickers, swindlers with expertise in foreign finances, "bust-out" operations, etc.) This provision could cripple such actions, preventing any meaningful judgment even after the victim suffers the added delay and expense it would cause.

The seventh provision of S. 438 which is deeply disturbing is the reduction of damages retroactively. The obvious effect of this provision is to reduce the liability of defendants currently under suit. The second effect is to unfairly reduce the damages for the victims who brought suit in reliance on the promise of federal RICO. Retroactive legislation, even ameliorated by the allowance of costs, is an unwise precedent.

The final critique of S. 438 is a more general observation. RICO reform's central goal is better social justice at less social cost due to litigation. We will not accomplish this goal if plaintiffs must rely on legislation that is so complex that it invites yet more litigation. The proposal starts with the current law of treble damages, and makes them the exception, rather than the rule; except, that is, for consumers; except, that is, in the securities or commodities areas; except that is, within those areas, for insider trading. All of the categories created by S. 438 must have boundaries. All of the boundaries must be defined by litigation. Some of them will also be moving targets because they will have to evolve over time as their social significance changes. Some are set by reference to other statutes, state and federal, which will also require changes.

S. 438 creates a series of inter-related factors. The required state of mind varies with the plaintiff and shifts from issue to issue. The cause of action depends on who the plaintiff is, who the defendant is, and what the alleged result is. Exceptions surround each rule, creating a bewildering array of possibilities. If RICO, as has been said, is modeled on a treasure hunt, S. 438 converts it into a treasure hunt as viewed through a kaleidoscope. Ultimately, a great deal of litigation will be required that will have no bearing on the merits of the victim's case. Now is the time for simplification, even if it means that some special industry interests must give up special legislative status.

The National Association of Attorneys General is eager to participate in constructive RICO reform. To that end, it suggests the following additions to S. 438:

1) True Parens Patriae

For all of the reasons that parens patriae standing is appropriate in anti-trust, it is needed to allow government entities to help redress the rights of victims who are too intimidated, numerous, elderly, dispersed, unsophisticated or disabled to be effective plaintiffs. The language of 15 U.S.C. §§ 15c-15h provides a useful model. More, however, is called for and is easily applicable in the RICO context. RICO parens patriae should not be limited to representative suits on behalf of individual state residents. It should also authorize suits to recover damages to the general economy of the state. This concept was included in an early version of the Senate bill, S. 1284, 94th Cong., 1st Sess. (1975), of the legislation that later became 15 U.S.C. § 15c-15h. It is especially important in the RICO context because much governmental civil RICO work involves racket crimes whose victims are the society as a whole or all consumers, including the consumers of the illegal industry itself, rather than identifiable victims, such as drug cases, prostitution, and gambling. Unlike anti-trust damages, which may be difficult to fix, the damages from the misallocation of money to criminal rackets is clearly not less than the misallocated money itself. Damage could be measured by the defendants' gross gain from racketeering. Although this vastly understates the social costs of, for example, drug dealing, it is objectively quantifiable and trebling will at least approach the real damage amount. This type of cause of action for economic loss to the state economy would be especially useful to combat drug cartels. It would not depend on tracing the money to a drug transaction, so it would be useful to reach assets that forfeiture does not reach. To the extent that it would strip some of the $110 billion dollars per year grossed by drug dealers, it would augment the forfeiture efforts of federal and state prosecutors in this endeavor. Arizona has a similar single damage provision in its state RICO statute, and uses it frequently. This powerful new tool to combat the drug trafficking industry at its financial heart should be provided to each and every state.

One of the criticisms of civil RICO has been that very few civil RICO cases have been brought against organized crime figures or racket industries. One reason is fear of bringing suit. Another is the economics of rackets that, like anti-trust price fixers, often victimize many people but cost each one only a small amount. Providing full parens patriae powers to state Attorneys General would address the organized crime focus of civil RICO, would directly meet the reasons there have been so few such cases, and would present little or no potential for abuse.

The pre-judgment interest provisions of anti-trust law, 15 U.S.C. § 15a, should also be imported into RICO at the same time. The language of § 15a should simply be modified to apply to all plaintiffs rather than the United States.

2) Financial Counter-Incentive

The root of excessive RICO litigation costs is the decision to file RICO cases. This decision is made by a lawyer, in consultation with a potential plaintiff. The allegation is that because treble damages are available under RICO, the lawyer will feel compelled, for his client's sake if not for the lawyer's own sake, to employ RICO even though the facts are weak or the context is inappropriate. By removing the gold medal, S. 438 attempts to eliminate the improper competitors. This method will no doubt reduce the improper competitors. It will also eliminate the entire competition in the process; it will deny to victims any meaningful remedy for losses caused by clearly criminal conduct. A better method is available. The attorney's decision to file a RICO action simply requires a counterbalancing financial incentive to assure that the attorney will investigate and critically evaluate the case before employing RICO. Rule 11, F.R.C.P., provides the standard of care. Civil RICO could mirror the language of Rule 11 or simply refer to it. If this is not seen to be sufficient counter incentive, a provision could be added allowing a RICO defendant to recover double his costs and attorneys' fees attributable to his defense of a RICO case or RICO claim that was found to violate Rule 11. The risk of double costs would no doubt deter frivolous RICO actions and it would not eliminate the much-needed treble damage remedy for solid RICO victims.

Along this same line of focusing on the RICO complaint itself, the Attorneys General are in overall agreement with S. 438's requirement of particularity in pleading. The provision would be more useful, however, if it made specific reference to the problem areas -- allegations of fraud, conspiracy, respondeat superior and other vicarious liability, and agency. This would more clearly allow the beneficial features of notice pleading while smoking out the inappropriate complaints. The effectiveness of this provision would be enhanced by a revision of the pattern requirement, as suggested earlier. In fact, the Supreme Court is expected to rule on this requirement shortly, and that decision could serve as the basis for the revision, or it could even be codified itself.

Another alternative would be to codify a provision based on the standing order announced by the Eastern District of Ohio in Lyman Steel. Lyman Steel Co. v. Shearson Lehman Bros., 13 RICO L. Rep. (CLR) No. 5 at 804 (March 11, 1986). This requires the plaintiff to plead with particularity the pattern and enterprise elements as well as the predicate acts of fraud. The plaintiff must file a statement which includes the facts he is relying upon to initiate the RICO complaint as a result of the "reasonable inquiry" requirement of Rule 11.

Finally, it has been suggested that a new procedural standard of "civil probable cause" be created. If frivolous RICO claims survive motions to dismiss because the cause of action may be pled with marginal sufficiency, such claims should not be able to withstand a preliminary hearing in which the plaintiff must show that there is probable cause to believe that, for example, an enterprise has been operated in a pattern of fraud, as defined by the statute, and that the defendant is the one who committed the predicate offense.

Together, these recommendations provide a means by which frivolous or insubstantial RICO claims may be dismissed, while retaining the current benefits of civil RICO for legitimate victims.

3) Restraining Orders

Under 18 U.S.C. § 1964(b), restraining orders and prohibitions are available in actions brought by the United States. Some state civil RICO statutes extend this equitable procedure to private parties as well. Extending § 1964(b) to the same extent would provide greater uniformity in the law and provide this important feature to all litigants under RICO.

4) Legislative Findings

The courts will look to any RICO amendment for guidance on literally dozens of issues. Many of those issues are not addressed by S. 438. Some of them will be created by S. 438, if it becomes law. Legislative findings would provide broad guidance where the statute itself may not be specific. Further, the process of arriving at findings may promote constructive debate and help avoid some of the undesirable features of legislation that is proposed during the process. Even if findings are not ultimately adopted, much good would flow from open discussion of what the goals of RICO should be, in what particulars RICO has fallen short, and how RICO should be improved. This process must precede a true "reform."

CONCLUSION

Civil RICO is of tremendous importance to the economic well-being of all citizens. Properly functioning, it embodies the alliance between law enforcement and the legitimate business community that is essential to keeping commerce free of resource misallocations based not on real value but on fraud and other crimes. The importance of confidence in the marketplace has recently been underlined by the current fraud-induced savings and loan crisis. The state prosecutors are, of course, experiencing the same developments in massive fraud and economic crime that characterize the nightly national news. Somewhat less than half the states have only federal civil RICO to look to. The amendments made here will also have an immediate effect on the states that do have state RICO statutes. State courts will continue to look to federal RICO law, particularly if the state courts are given concurrent jurisdiction, as we recommend. The National Association of Attorneys General is therefore deeply committed to a reform process that serves the true spirit of RICO as pro-victim and at the same time pro-legitimate commerce.

In many ways this legislation presents a recurring test for this nation; a test to determine whether our courts remain open to all innocent victims regardless of their lack of political or economic power. To retreat now from the full force of RICO would be an act of great irresponsibility and would break faith with the American people who have been promised and who deserve the best legal weapons available to fight the corruption of fraud and to preserve and protect our free market.

Mr. Chairman, this concludes my statement. I am anxious to address any questions that you or the Members of this Committee may have.

Submitted by RICO Subcommittee

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Winter Meeting
December 4-8, 1988
Kauai, Hawaii

V

RESOLUTION

RICO

WHEREAS, enterprise crime and sophisticated schemes to defraud public and private victims have a multi-billion dollar annual impact in damages and lost revenues to private commerce as well as to local, state, and federal governments; and

WHEREAS, Congress enacted in 1970, the Racketeer Influenced and Corrupt Organization (RICO) provisions, Title IX of the Organized Crime Control Act, which applies to patterns of racketeering activity involving personal violence, provision of illegal goods and services, corruption in private or public life, and various forms of fraud, and also provides important criminal and civil sanctions to protect victims of patterns of racketeering activity, including:

- criminal forfeiture of proceeds of racketeering activity;
- criminal forfeiture of interests in enterprises;
- equitable relief for the government;
- equitable relief for victims of racketeering activity; and
- treble damages, costs, and attorney's fees for victims of racketeering activity; and

WHEREAS, since 1972, a majority of states have enacted legislation patterned after Title IX as an effective and essential means of redressing wrongs, and additional states are actively considering the passage of such legislation; and

WHEREAS, the 99th and 100th sessions of Congress have engaged in protracted debate over proposed amendments which would repeal or weaken key provisions of Title IX ; and

WHEREAS, the National Association of Attorneys General has consistently opposed attempts to repeal or to weaken the provisions of Title IX, including efforts to enact retroactive rules limiting the recovery of damages in pending RICO civil litigation, amendments which would exempt specific businesses from the threat of RICO liability, and provisions to weaken the incentive of treble damage awards for racketeering conduct; and

WHEREAS, the National District Attorneys Association, the North American Securities Administrators Association, the National Conference of State Legislatures, the National Association of Insurance Commissioners, and consumer organizations have supported the efforts of the National Association of Attorneys General in opposing these amendments;

NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:

(1) Reaffirms its support for the federal RICO provisions and continues to support reasonable modifications of the law which will curtail any abuse of its provisions through litigation;

(2) Continues to oppose efforts in the U.S. Congress to repeal or weaken the provisions of Title IX;

(3) Commends the NAAG RICO Subcommittee, chaired by Attorney General Robert Corbin and formerly by Attorney General Ken Eikenberry, for its efforts to preserve the civil RICO statute; authorizes the Subcommittee to draft proposed RICO reform legislation which embodies the principles expressed in this and all previous resolutions and in the testimony presented to Congress on behalf of the Association; and further to circulate said draft for comment to all Attorneys General and to report back to the Association at the Spring Meeting; and

(4) Authorizes the Executive Director to transmit these views to the Administration, appropriate members of the Congress, and other interested organizations.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Spring Meeting
March 8-10, 1987
Washington, DC

RESOLUTION

III

HAZARDOUS WASTE VIOLATION AS A PREDICATE OFFENSE FOR RICO

WHEREAS, the increasing body of knowledge regarding the present and future adverse impacts on and serious endangerments of the public health, welfare and the environment which result from the improper handling and disposal of hazardous wastes has led and is continuing to lead to much-needed regulation of hazardous waste management and disposal practices; and

WHEREAS, the lawful and environmentally responsible management and disposal of hazardous wastes in compliance with federal and state laws and regulations results in costs which are often orders of magnitude higher than illegal dumping or other improper hazardous waste disposal practices; and

WHEREAS, the still-increasing cost differences between legal hazardous waste disposal practices which are protective of the public health and the environment and illegal practices which can jeopardize the health and welfare of our nation's citizens and communities is providing a growing impetus for corrupt individuals and organizations to seek illicit gain by inducing legitimate businesses, through fraud or misrepresentation, to utilize the "lower cost" hazardous waste disposal "services" offered by the corrupt individuals or organizations; and

WHEREAS, the endangerments to the public health and the environment and the damage to our nation's natural resources which can result and have resulted from the illegal hazardous waste management and disposal practices employed by corrupt individuals and organizations for their illegal profit-making purposes emphasizes the urgent need to effectively deter such practices and to divert from such corrupt individuals and organizations the proceeds of such illicit activities; and

WHEREAS, the principal and most-effective piece of federal legislation aimed at deterring such illegal enterprises and diverting from corrupt organizations such illicit proceeds is the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. secs. 1961-1968 (1984); and

WHEREAS, the list of predicate offenses contained in 18 U.S.C. sec. 1961(1) (1986 Supp.), which trigger the application of RICO's civil and criminal provisions and remedies does not include any provisions aimed directly at criminal enterprises in the hazardous waste management and disposal areas; and

WHEREAS, many state "RICO" and organized crime control acts incorporate by reference the list of predicate offenses recited in the federal RICO Act, 18 U.S.C. sec. 1961(1) (1984), thereby enabling a single change in the federal Act to achieve maximum beneficial effect by directly enabling states to apply their own resources, processes and sanctions to such criminal enterprises while at the same time enabling federal enforcement resources to be effectively applied against such criminal enterprises; and

WHEREAS, the absence of a specific provision in federal RICO aimed at criminal enterprises in the hazardous waste management and disposal areas makes application of the RICO statute's provisions and sanctions to hazardous waste-related crimes more difficult and uncertain, thereby reducing and/or eliminating the significant deterrent potential of the statute and exposing our nation's citizens and natural resources to endangerments which could otherwise be prevented or deterred.

NOW, THEREFORE, BE IT RESOLVED BY THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL that the Congress of the United States should be, and hereby is, urged to promptly amend the provisions of the federal RICO statute by adding to the end of 18 U.S.C. sec. 1961(1) (1986 Supp.), the following language:

> (E) Any act which is indictable under section 3008 of the federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. sec. 6928 (1984), or any act which is chargeable as a crime under a similar provision of a state hazardous waste program authorized by the Administrator of the Environmental Protection Agency, pursuant to section 3006 of RCRA, 42 U.S.C. sec. 6926 (1984).

The addition of this language would add knowing violation of hazardous waste management and disposal laws to the list of RICO "predicate offenses," two (2) violations of which trigger application of the RICO statute's deterrent civil and criminal sanctions.

BE IT FURTHER RESOLVED that:

1) a legislative subcommittee of the Environment Committee be created;

2) interested Attorneys General be requested to designate staff to serve on the subcommittee;

3) the subcommittee monitor the progress in Congress and in federal agencies of environmental issues upon which NAAG has taken positions by formal resolution;

4) the subcommittee bring the resolutions passed by the Association to the attention of the U.S. Department of Justice's National Environmental Enforcement Council, the U.S. EPA Advisory Committee, Congress and federal agencies; and

5) members of the subcommittee are authorized, in consultation with the chair of the subcommittee, to speak on behalf of the Association and to advocate before Congress and the federal agencies the Association's position on this resolution.

BEST AVAILABLE COPY

Senator DECONCINI. Let me say that I hold the National Association of Attorneys General, as I do the National Association of District Attorneys, in the highest regard. Indeed, I thank you for your compliments, but I also wish to express to you, your members, and your leadership the gratitude that this Senator has for the strong support and involvement in the process, not waiting to sit out there and oppose a bill as it comes on the floor or support a bill, but getting there early.

I thank you for being here and for your offer to continue to work with us—and we will accept that offer and continue to work with you to see if we can resolve some of the differences we have. Your testimony is helpful indeed.

Let me just ask a couple of questions, Mr. Twist, and then I will go to Mr. Raven. Last Congress, the National Association of Attorneys General testified that it supported RICO reform that would preserve RICO's effectiveness as a prosecution weapon against organized or white collar crime, as well as terrorists or other violence-prone groups.

We have attempted to listen to your concerns, as well as the Justice Department's, and have made several changes in the legislation in this Congress; namely, S. 438. It strengthens RICO by adding 28 new predicate offenses, provides for international service of process, provides for survivability of plaintiff claims against the estate of a RICO defendant.

Wouldn't the enactment of these provisions assist State attorneys general's efforts in prosecuting white collar crime and organized crime?

Mr. TWIST. Yes, they would, Mr. Chairman, and——

Senator DECONCINI. The problem is they just don't go far enough?

Mr. TWIST. Well, those provisions are good and they will aid immeasurably in the effort. The problem is that other provisions of the legislation take away from victims and private attorneys general the ability to combine with State and Federal efforts to fight the problem, and we need that combination right now.

Of particular concern would be the provision on prior criminal conviction, and I would just commend again to your attention footnote 9 in the Supreme Court's *Sedima* opinion where even the majority of the Court points out the real difficult problems that that would pose to prosecutors who are faced with having their decision to prosecute have these private civil consequences. I think that would do damage to the Government's ability to pursue criminal cases.

Senator DECONCINI. Thank you. Mr. Twist, in the order of punitive damages, the national association objects to the formulation of a new standard that we have in S. 438. That new standard was included in S. 438 because previous standards were not taken from any other statute or case law.

We included the standard adopted by the Arizona Supreme Court in 1986. Isn't it better to adopt a standard that already exists elsewhere, and why isn't this an appropriate standard?

Mr. TWIST. Mr. Chairman, I think the history in this country under the antitrust laws is proof, if you will, that the treble damage remedy that currently is found in RICO is really the only effective monetary sanction—the most effective monetary sanction that can be found.

With respect to the supreme court's formulation of the punitive damage remedy, in the State supreme court's opinion which adopts that, you will note that one of the elements of proof that the court said would establish that definition of punitive damages was proof of criminal fraud, was proof of an intent to defraud.

So when you apply—if the issue that is addressed by the Senate legislation is the problem of using RICO in fraud cases, even applying the standard that is included in there under the Arizona Supreme Court's formulation would be found in every case where you demonstrated an intent to defraud.

So I think it both may be as overinclusive, and to the extent that the words would be interpreted in a way not to follow the Arizona Supreme Court opinion, probably underinclusive at the same time.

So, you know, I commend the Senator for trying to come up with a definition. I think this particular one is somewhat faulty when applied to fraud.

Senator DECONCINI. Would you offer any?

Mr. TWIST. We would be happy to work with you on that, Senator, yes.

Senator DECONCINI. Very good. Let me ask another question. I would like to have your association's comment on the Justice Department's analysis of the new predicate offenses under S. 438. Generally, the Department believes that S. 438 adds many unnecessary predicates, and would limit them to include only those dealing with financial institutions.

If you have not had a chance to review that, I would be glad to have you submit a response, unless you are familiar with it.

Mr. TWIST. I will be happy to submit something on behalf of the association. Generally, we favor the additions which the bill proposes. I noted in Mr. Keeney's remarks that he also urged you to consider another one, the Bank Fraud Act, and certainly we would endorse that. But I will be happy to submit in writing a formal response.

Senator DECONCINI. Mr. Twist, I have a number of other questions, but due to time constraints I would ask that I could submit them for your response in a reasonable time. We would like to have them on the record.

[The questions and responses follow:]

Attorney General
1275 West Washington
Phoenix, Arizona 85007
Robert K. Corbin

June 26, 1989

The Honorable Dennis DeConcini
United States Senator
Committee on the Judiciary
328 Hart Senate Office Building
Washington, DC 20510-6275

Dear Senator DeConcini:

Thank you for the opportunity to testify at the Racketeer Influenced and Corrupt Organizations hearing. As stated, NAAG remains eager to work with you, your staff, and the Senate Judiciary Committee to fashion meaningful RICO reforms which do not eliminate RICO as a remedy for legitimate vicitims of racketeering activity. Please let me know when you think a discussion toward this end could be scheduled.

You have submitted several supplemental questions for inclusion in the hearing record and I am pleased to supply you with my answers. Again, we appreciate the opportunity to work with you and look forward to hearing from your staff.

Very truly yours,

STEVEN J. TWIST
Chief Assistant
Attorney General

SJT:DP:ms
Enclosures

Question 1.

Last Congress, the National Association of Attorneys General testified that it supported RICO reform that would preserve RICO's effectiveness as a prosecution weapon against organized or white collar crime as well as terrorism or other violence prone groups. We have attempted to listen to your concerns as well as the Justice Department and have made several changes in the legislation this Congress. S. 438 strengthens RICO by adding 28 new predicate offenses, provides for international service of process, provides for the survivability of plaintiffs' claims against the estate of a RICO defendant. Wouldn't the enactment of these provisions assist the state Attorneys General's efforts to prosecute white collar and organized crime?

Answer

While NAAG would support efforts to strengthen RICO and prevent demonstrated abuses of civil RICO, NAAG must oppose any attempt to weaken RICO's ability to provide the most effective remedy available for the victims of organized crime, white collar crime, terrorism and other violence prone groups. For this reason, NAAG does support certain provisions in S. 438 such as adding new predicate offenses, providing for international service of process and providing for the survivability of plaintiffs' claims against the estate of a RICO defendant. Unfortunately, the benefits of these provisions do not outweigh the numerous other provisions in S. 438 that will significantly weaken RICO's effectiveness and, as a consequence, cause damage to innocent victims. Those provisions have been listed and criticized in my testimony.

Two of those provisions are particularly pertinent to this question because you ask whether the new predicate offenses, process and survivability provisions would not help state attorneys general in their efforts to prosecute organized crime and white collar crime. If, however, S. 438 was intended to assist state attorneys general, it would not contain provisions that would discourage most victims from suing on their own. S. 438 takes away the incentive for victims to sue by limiting their recovery and placing unreasonable burdens on victims seeking damages. Discouraging victims to utilize civil RICO effectively eliminates the most important supplement to state and federal enforcement efforts. Moreover, if S. 438 was intended to help state attorneys general, then it would not condition a victim's right to recover treble damages on whether the government has filed a prior criminal case and achieved a conviction. A matter completely unrelated to the merits of the victim's claims would determine whether the victim could recover damages. This provision would leave legitimate victims to the vagaries of the criminal justice system and put inappropriate political pressure on a prosecutor's decision to prosecute. Prosecutors' discretion, unfortunately, is often guided by resources first, then merits. Many large fraud cases, for example, are declined precisely because the victim is in a position to sue. Thus, this provision would impede rather than assist state attorneys general by thwarting the effectiveness of civil RICO.

Additional predicate offenses could include all federal fraud offenses, including specifically bank fraud.

Further, if the goal is to assist state attorneys general, then civil RICO must include a true parens patriae provision which would allow state attorneys general to use civil RICO on behalf of individual state residents and authorize suits to recover damages to the general economy of the state.

Question 2.

Does NAAG recognize that there have been a substantial number of abusive civil RICO lawsuits filed in the last few years? Can't the concept of private attorneys general be carried too far? Isn't the concept more appropriate for organized crime or sophisticated schemes that have resulted in convictions rather than in situations where one businessman has attempted, maybe even fraudulently, to gain a competitive advantage over another one? Aren't there adequate remedies for these commercial situations?

Answer

First, both Professor Blakey and I have stated repeatedly that there has not been a flood of abusive RICO cases. Federal civil RICO filings have never amounted to more than 0.05% of federal civil cases, and actually have declined 12% in 1987-1988. Proponents of RICO reform have identified fifty-three cases filed between December 1979 and January 1988 as "abusive"--yet several of these cases are clearly not abusive, and none granted a money judgment to the plaintiff. In fact, sanctions against the plaintiff were awarded to 40% of the defendants who requested them. Furthermore, a close reading of these cases shows that RICO was not the only "abused" statute. Civil rights and antitrust statutes, as well as state laws, commonly were asserted along with the RICO claims; reforming RICO will not stop abuse of these statutes. In addition, the defendants requested sanctions in only 19% of the fifty-three cases, indicating that the parties themselves did not consider the cases to be abusive or frivolous.

Second, RICO's purpose was to "serve as a weapon against ongoing unlawful activities whose scope and persistence pose a special threat to social well being." HMK Corp. v. Walsey, 828 F.2d 1071, 1076 (4th Cir. 1987). But state and federal prosecutors do not have the resources to prosecute every case of fraud or racketeering. "Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps. This purpose would be largely defeated, and the need for treble damages as an incentive to litigate unjustified, if private suits could be maintained only against those already brought to justice." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 493, 105 S.Ct. 3275, 3275, 3283 (1985) (citations omitted). To limit the action of "private attorneys general" to duplicative or highly complex litigation would not further the original purpose of RICO, yet this is precisely what the provisions of S. 438 would require.

Finally, remedies do exist for fraud in commercial situations. What distinguishes these "commercial situations" from a legitimate RICO claim is found in the concepts of "pattern" and "enterprise," which are aimed at planned, ongoing, continuing crime carried out in a structural, organized environment. Isolated incidents of fraud do not fall into this pattern requirement--as many plaintiffs have learned over the past few years when their suits were dismissed. However, a "businessman" who engages in a pattern of fraudulent activity to gain a "competitive advantage" over others should be subject to greater liability. Morever, given the scope of the fraud in the savings and loan industry, current remedies clearly are not adequate.

Question 3.

In April, the Chief Justice said, "Most of the civil suits filed under the statute have nothing to do with organized crime. They are garden-variety civil fraud cases. . . I think that time has arrived for Congress to enact amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime, or have some other reasons for being in federal court." Does NAAG agree with Chief Justice Rehnquist that the proper balance between the use of civil RICO to fight fraud and the use of it against organized crime has been lost and should be restored?

Does NAAG believe that there should be a federal treble-damage fraud statute? Why should fraud be singled out for federal treble damage treatment, as opposed to murder, assault and battery or burglary?

Answer

In answer to your first question, "garden variety fraud cases" cease to be "garden variety" when the fraud is a planned, ongoing, and continuing crime carried out in a structured and organized environment. Moreover, a case that involves intentional misrepresentation, material omission, and other elements of criminal fraud should not be considered "garden variety" unless such fraud has become "business as usual" in this country. In addition, Chief Justice Rehnquist's criticism of civil RICO is one of scope, not remedy. He takes issue with the types of offenses that are included within RICO's predicate offenses. Although proponents of S. 438 have used the Chief Justice's criticism of civil RICO as support for changing the RICO statutes, S. 438, ironically, does not contain provisions to limit the scope of civil RICO. Instead, S. 438 limits the recovery that victims of organized crime and white collar crime can seek. By limiting the recovery of most victims and placing unreasonable burdens on victims seeking damages, S. 438 would effectively discourage victims from utilizing civil RICO. The solution to the Chief Justice's criticism that civil RICO is too broad, however, surely is not to eliminate the incentive to sue under civil RICO. A more appropriate solution, if the definition of fraud is believed to be too broad in the RICO context, might be to adopt a narrower and clearer definition of the "pattern" requirement in civil fraud cases. The codification of the "pattern" requirement would now seem even more appropriate in light of the recent Supreme Court decision in H.J., Inc. v. Northwestern Bell Telephone Co., No. 87-1252 (U.S. June 26, 1989).

As to your second question, treble damages should be the award given to every legitimate victim of RICO violations. Unfortunately, the drafters of S. 438 have proposed RICO reforms that shift from the current law of treble damages to a series of bewildering rules and exceptions to those rules. The cause of action and the possible recovery would depend on who the plaintiff is, who the defendant is, what the offense is, and what the harm is.

In response to your third question, three reasons immediately stand out as justification for awarding treble damages for a violation of civil RICO. First, fraud is not "singled out" for treble damage treatment. Civil RICO is reserved for suits against persons who have engaged in a pattern of unlawful activities. A single event such as a murder or a burglary or a fraud does not give rise to a civil RICO cause of action. If, however, a pattern of murders, robberies, or fraud is committed, then the current civil RICO will allow for treble damages. Second, an award of treble damages is particularly justified for a pattern of fraudulent activity because this award serves as a deterrent. S. 438 unwisely reduces the deterrent effect of RICO by reducing the recovery of victims from treble damages plus attorney's fees to actual damages alone. The result of this reduction is to reduce by over two-thirds the liability of those who have committed a pattern of prohibited activities, and thus reduce the risk involved in committing those activities.

Finally, treble damages also provide a necessary incentive to the victims to seek redress for their grievances. Limiting the availability of treble damages would effectively eliminate the most important supplement to state and federal enforcement efforts.

Question 4.

I would like to have NAAG's comments on the Justice Department's analysis of the new predicate offenses under S. 438. Generally, the Department believes S. 438 adds many unnecessary predicates and would limit them to include only those dealings with financial institutions. If you have not had the chance to review their analysis, could you please submit your comments?

Answer

Initially, I believe your general description of the Department of Justice's position is overstated. After reviewing the statements made by John Keeney, Deputy Assistant Attorney General, Criminal Division, I do not believe DOJ would limit the proposed predicate offenses of S. 438 to include only those dealing with financial institutions. DOJ's main objection toward the new predicate offenses is that those offenses already are covered by RICO, and therefore, are unnecessary. Of the proposed predicate offenses that DOJ does support, many do not necessarily involve financial institutions. For example, prostitution involving minors and obstruction of justice are two predicate offenses supported by DOJ.

The DOJ position, as presented by Mr. Keeney, recognizes the need to add predicate offenses involving fraud.

NAAG agrees with the need to add additional predicate offenses to combat the pervasive number of frauds occurring in our nation. The savings and loan industry alone has estimated losses of $100 to $150 billion. Fraud is the major contributing factor for this crisis.

Question 5.

A subsequent witness will testify that Indian tribes should be entitled to governmental status under S. 438 and thereby be entitled to treble damages in civil RICO suits? Does NAAG support such an amendment to S. 438?

Answer

Tribal governments and organizations should be entitled to treble damages under civil RICO, as should every legitimate victim of activities in violation of RICO's provisions.

This question illustrates a major problem with S. 438. By saying this group may have treble damages while that group may not, S. 438 risks putting some deserving plaintiffs in a less-privileged position. If state governments are entitled to treble damages, why not tribal governments? What about labor unions? Or small businesses? Why is there a distinction between units of local government and units of general local government? The categories of victims created by S. 438 ignore important differences and similarities among the members of each category. For example, a small business is treated the same as a Fortune 500 company. Both are limited to actual damages, yet a small business may be just as devastated by patterns of criminal conduct as a non-profit organization or an individual consumer.

Question 6.

By introducing S. 438, I do not intend in any way to mean that we should tolerate fraud. You state in your testimony that intentional misrepresentation, material omission and other elements of criminal fraud should not be considered to be "garden variety" contract disputes, and I wholeheartedly agree. However, I see no evidence that state criminal and civil fraud statutes are inadequate to handle these problems. As I know you agree, states cannot look to the federal government and the federal courts to solve every problem. Recognizing that many commercial disputes do involve criminal activity, why does the federal government and its courts need to get involved? I guess I don't understand the attitude "We can't handle it, let's let big brother do it."

Answer

Fraud and other types of criminal activity in commercial settings are problems which cost this country billions every year, rivaling the impact of the drug problem. However, saying that the federal government should be involved in this national problem is not a request that "big brother" do it alone. Rather, as in the efforts to halt the spread of drug activity, state and federal governments must work together--the job is far too great for either level of government to handle alone.

Moreover, each of us realizes that the resources of the government alone, both state and federal, will never be sufficient to adequately deter such activity. Therefore, making the courts of the federal government available to victims, while a benign involvement, is nonetheless very important. Given the benefit to victims, the minor impact on the federal courts' caseload seems to be a worthwhile use of federal judicial resources.

Question 7.

You properly point out that civil RICO recovery depends on a finding of criminal conduct. However, such a finding is based on the civil standard of preponderance of the evidence rather than the criminal standard of beyond a reasonable doubt. In your testimony you state that the result of S. 438 is to reduce the liability by two-thirds of those found "guilty" of illicit activities. I don't mean to be picky about this, but I think your use of the word "guilty" illustrates exactly the tremendous coercive and harassing value of civil RICO. To the public if one loses a civil RICO case, one is "guilty" of a crime even though the standard is not a criminal one. I believe we need to remove this bludgeon from the commercial dispute arena. Would you care to comment?

Answer

First, there is no good evidence that civil RICO is a "bludgeon" in the "commercial dispute arena." Aside from intuitions, the only indication that civil RICO has any effect on forcing settlements by innocent defendants are unsubstantiated comments in a small ABA survey. Indeed, if you are correct about the stigma of being "found guilty" in a civil

RICO trial, one would think that defendants who have done nothing wrong would fight to the bitter end to clear their good names. Finally, as the Supreme Court has observed, "a civil RICO proceeding leaves no greater stain than do a number of other civil proceedings." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 492, 105 S.Ct. 3275, 3283 (1985).

Second, a tremendous distinction exists between being "found guilty" beyond a reasonable doubt in a criminal trial and being found to have violated a law by the preponderance of the evidence in a civil RICO proceeding. The consequences of these findings create this distinction. In the former case, one may be imprisoned for up to twenty years, as well as fined and forced to forfeit all assets tainted by the illegal activity. Under the civil finding, one is liable only for treble damages and reasonable attorney's fees, and then only if the plaintiff shows by a preponderance of the evidence that the defendant committed the predicate offenses.

However, if a defendant in a civil action is found to have engaged in racketeering activities, including fraud, whatever social opprobrium attaches to him is more than justified, and serves to deter others from similar conduct.

Question 8.

You state that S. 438 "in effect. . . creates two classes of victims: those who are entitled to something more than actual damages and those who are not." Doesn't RICO itself do the same thing? Doesn't S. 438 really just attempt to more fairly balance these two classes? At least in Federal court?

Answer

Usually, the level of damages a plaintiff is entitled to receive depends on the nature of the wrongful conduct. In tort law, for example, mere negligence gives rise to liability for actual damages; malicious acts by the tortfeasor give rise to punitive damages. Similarly, the pattern requirement in civil RICO cases justifiably increases the damage award over cases where there is no pattern of illicit activity. HMK Corp. v. Walsey, 828 F.2d 1071, 1076 (4th Cir. 1987) ("Congress chose the pattern requirement of § 1962(a) as the mechanism by which ordinary claims of fraud best left to the state common law of fraud are distinguished from those activities of such a criminal dimension and degree as to warrant the extraordinary remedies of RICO"). But, instead of focusing on the defendant's culpability or the nature of the wrong, S. 438 looks to the nature of the plaintiff. As a result, for the very same wrongful acts, a unit of general local government automatically receives treble damages, a unit of local government receives up to double punitive damages upon special showing, and a unit of tribal government receives only actual damages.

It is difficult to see any rational basis for these distinctions. Sometimes the law does make distinctions between plaintiffs, but it usually does so in order to protect those who are less able to protect themselves, such as children. If this is the rationale for S. 438, it would imply that a state is somehow less able to protect itself from fraud than a tribe, a labor union, a private business or even a private person.

Alternatively, if the rationale for this distinction is based on the impression that certain plaintiffs are not entitled to anything more than actual damages because they are responsible for the "flood" of "abusive" cases, then, assuming such impressions are correct, such a limitation would be akin to saying that, because white males seem to be responsible for a majority of frivolous tort suits, white males can never receive punitive damages. In other words, the class as a whole is somehow less deserving of the full range of remedies because of perceived--or even actual--transgressions of a few members of that class.

The current law creates classes based on the egregiousness of the defendant's conduct. S. 438 is a Procrustean bed that "balances" classes of victims by denying enhanced remedies to all but a few special groups.

Question 9.

I take it from your recommendation 2 that you disagree with Professor Blakey that present financial counter-incentives under RICO are sufficient. Is that correct?

Answer

In Professor Blakey's testimony, he states:

> Those who would rewrite RICO have the burden of proof to show--
>
> 1. that a substantial number of frivolous or otherwise abusive RICO suits are being filed,
>
> 2. that existing safeguards against such suits are not adequate to remedy them,
>
> 3. that new safeguards adequate against such suits cannot be designed, and
>
> 4. that the detriment from these suits outweighs the benefit from legitimate suits.
>
> None of these burdens have been met.

Testimony of Professor G. Robert Blakey at 10 (emphasis in original).

I agree with Professor Blakey's conclusion. The existing safeguards against abusive litigation-- F.C.R.P. 9, F.C.R.P. 11, 28 U.S.C. § 1927, F.R.A.P. 38, 28 U.S.C. § 1912, ethical standards and the inherent contempt powers of the courts--are adequate, although they could be used more often and more effectively. However, S. 438 is evidence that there are some who do not believe current safeguards are adequate, and it was for them that NAAG proposes additional safeguards.

These additions are alternatives to the drastic undercutting of RICO remedies proposed by S. 438. If Rule 11 is not sufficient, then double the remedy for the defendants rather than reduce the remedy for the plaintiffs. If RICO is too easy to allege, strengthen the pleading requirements or require a preliminary hearing to screen out the frivolous cases. Rather than disagreeing with Professor Blakey, my recommendation shows that new safeguards are possible.

Mr. TWIST. Thank you very much for allowing us to testify, Mr. Chairman.

Senator DECONCINI. You can stay. I have a couple of questions for Mr. Raven and maybe that will provoke you so that you want to say something more.

Mr. Raven, does the ABA policy that you have submitted here, and its position, represent a small section of the bar or is it the reflection of a broad cross-section of the legal profession?

Mr. RAVEN. I believe it is quite strong support. In the beginning, in 1986, there were some of the votes at that time—there was a respectable minority, but as I recall, the vote on the report of the coordinating committee which we are dealing with was passed quite overwhelmingly by the House.

Senator DECONCINI. Thank you. The 1986 ABA house of delegates approved a report, as you mentioned, recommending, among other things, that defendants be entitled to recovery of costs and attorneys' fees in business-to-business suits frivolously or unreasonably brought.

How would you define "unreasonably brought?" I assume that this term is meant to be broader than the current rule 11 standard. I find such a provision attractive, but I am afraid it would be very difficult to draft.

Instead, S. 438 would remove the incentive to bring unreasonable civil suits by removing the treble damage incentive. Which is the better approach?

Mr. RAVEN. May I let Mr. Mannino address that? He is much more familiar. He has been debating that.

Senator DECONCINI. Mr. Mannino.

Mr. MANNINO. Senator, in terms of the resolution that was passed by the ABA, we used the term "substantially justified." Unless a plaintiff who loses a case can demonstrate that his, her or its claim was substantially justified, attorneys' fees should be awarded against it.

There is a body of law under the Equal Access to Justice Act, which the courts are very familiar with, in which there is a standard using the words "substantially justified." So there is a body of precedent to support that. That is contained in section 2 of the summary of the action of the house of delegates that is attached to President Raven's remarks.

Senator DECONCINI. Thank you. Lastly, a subsequent witness, Mr. Raven, will testify that the general remedies against litigation abuse are adequate as they are today. Professor Blakey lists a number of cases in which rule 11 sanctions have been assessed.

As practitioners of litigation under RICO and as practitioners subject to rule 11 sanction, does the ABA agree with this analysis?

Mr. RAVEN. No, I do not think that rule 11 is going to reach this problem. I think that ordinarily the way the cases are developed, an attorney can draw, in good conscience, a complaint that will stand up. So I don't think that rule 11 is going to be the way to retard that. There has to be a significant change in the whole approach.

Senator DECONCINI. In other words, the frivolous lawsuits are the real problem. Are they not the real problem, or is the problem lawsuits that properly state a RICO claim, but from a public policy point of view really shouldn't be in Federal court?

Mr. RAVEN. Exactly. In other words, many of those cases are now adequate remedies at law in the State and the Federal courts without recourse to that.

Senator DECONCINI. Such as contract disputes or landlord-tenant disputes and divorce actions, et cetera?

Mr. RAVEN. Yes. So I think it would be a mistake to think that rule 11 is going to impact that in any significant way.

Senator DECONCINI. Mr. Twist, do you want to comment on rule 11 before I yield?

Mr. TWIST. Yes, Mr. Chairman. I believe that one of the areas where it might be productive for us to have a continuing discussion is in the area of a codification of a form of rule 11 which might address some of the deficiencies that the ABA currently finds in rule 11 and put it into the statute for RICO cases.

But the fact of the matter remains that if a lawsuit, as I believe you just characterized it, properly states a RICO claim, it must allege properly that conduct which is already a Federal crime is occurring. It is not just an ordinary contract dispute over the interpretation of a clause in a contract.

If it properly states a RICO claim, it states Federal criminal conduct, and if it improperly states that—if it alleges it and there are no facts for it, if it does it abusively or frivolously, then the statute can sanction that.

Senator DECONCINI. But has it not been used, properly drawn, and also thrown out for contract cases?

Mr. TWIST. It has, and there are cases—and I believe they are cited in Professor Blakey's testimony—cases where rule 11 sanctions have been imposed. One, in particular—there is a list of cases by the coalition for reform of so-called abusive cases, and I believe that the professor is going to mention these later in his testimony.

Senator DECONCINI. Yes, he will.

Mr. TWIST. But in one case, for example, rule 11 sanctions of over $42,000 were imposed. There is a case where the system works.

Senator DECONCINI. Well, there is no question there are some where it works, but are there some where it doesn't work?

Mr. TWIST. To the extent that we can try to fashion a codified version of that that strengthens and addresses some of the problems, I believe we would be wise to do so.

Mr. RAVEN. Mr. Chairman, may I address that matter a little further?

Senator DECONCINI. Yes.

Mr. RAVEN. I think it would be very bad policy to try and pick up these abuses by asking attorneys to give up rights that they think their clients may have in order to protect themselves in doubtful cases. I don't think it is good policy to do that under rule 11.

I also submit that rule 11 has never been tested yet in its ultimate power with respect to the enabling act, and I have always thought that it is a serious problem under the enabling act. When you start talking about forfeiting clients' rights as well as attorneys' rights, I think those questions will be raised and I don't know if it will survive the enabling act challenge.

Senator DECONCINI. Thank you, Mr. Raven. I will submit the balance of my questions.

[The questions and responses follow:]

Senator Dennis DeConcini

To American Bar Association

1. Do you agree with Justice Marshall's opinion that civil RICO is having the effect of "virtually eliminating decades of legislative and judicial development of private civil remedies under the federal securities law"?

2. Do you believe that the RICO situation has gotten worse since the last ABA survey in 1985?

3. The 1986 ABA House of Delegates approved a report that among other things, recommended that defendant's be entitled to recovery of costs and attorneys' fees in business-to-busines suits frivolously or unreasonably brought. How would you define "unreasonably brought." I assume that this term is meant to be broader than the current Rule 11 standard. I find such a provision attractive, but I am afraid it would be very difficult to draft. Instead S. 438 would remove the incentives to bring unreasonable civil RICO suits by removing the treble damages incentive. Isn't this a better approach?

4. Does the ABA support the existence of a Federal treble damages fraud statute?

SENATE JUDICIARY COMMITTEE
HEARING ON RICO REFORM ACT (S. 438)
JUNE 7, 1989

QUESTIONS SUBMITTED BY SENATOR HUMPHREY FOR WRITTEN RESPONSE

(To be submitted to Mr. John C. Keeney, U.S. Department of Justice; Mr. Robert Raven, American Bar Association; and Mr. Michael Waldman, Public Citizen's Congress Watch).

1. CIVIL RICO ACTIONS HAVE RECENTLY BEEN BROUGHT AGAINST PERSONS FOR ENGAGING IN PROTESTS OR DEMONSTRATIONS. THESE ACTIONS HAVE MAINLY INVOLVED ANTI-ABORTION PROTESTS, BUT THE SAME THEORY COULD BE USED TO BRING A CIVIL RICO ACTION AGAINST OTHER FORMS OF FIRST AMENDMENT ACTIVITY, SUCH AS ANTI-NUCLEAR OR ANTI-APARTHEID PROTESTS.

A. DO YOU CONSIDER THIS AN APPROPRIATE OR PERMISSIBLE USE OF THE RICO CIVIL ACTION?

B. GIVEN THE EXTREME BREADTH OF THE RICO STATUTE, AND THE HARSH PENALTIES IT IMPOSES, ISN'T THERE A REAL DANGER THAT IT CAN BE USED BY BOTH GOVERNMENT AND PRIVATE PLAINTIFFS AS A MEANS OF INTIMIDATING AND SUPPRESSING THE EXERCISE OF LEGITIMATE FIRST AMENDMENT RIGHTS?

C. CAN YOU GIVE ME ANY INDICATION FROM THE LEGISLATIVE HISTORY OF RICO THAT CONGRESS INTENDED IT TO BE USED AGAINST PERSONS ENGAGED IN DEMONSTRATIONS, PROTESTS OR OTHER FORMS OF EXPRESSION UNRELATED TO ECONOMIC OR COMMERCIAL GAIN?

D. HOW WOULD THE ESSENTIAL AND LEGITIMATE PURPOSES OF RICO BE UNDERCUT OR COMPROMISED IF THE STATUTE WERE AMENDED TO MAKE IT CLEAR THAT DEMONSTRATIONS, PROTESTS, AND OTHER FORMS OF FIRST AMENDMENT ACTIVITY WERE EXCLUDED FROM THE STATUTE'S COVERAGE?

AMERICAN BAR ASSOCIATION

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June 28, 1989

Honorable Dennis DeConcini
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Senator DeConcini:

I am submitting the attached written responses to some supplemental questions submitted to me by yourself and Senator Humphrey following my testimony before the Senate Judiciary Committee on June 7, 1989 on the subject of S. 438, the Racketeer Influenced and Currupt Organizations Reform Act.

Thank you again for the opportunity to participate in the hearing.

Sincerely,

Robert D Raven

Robert D. Raven

Written Responses of Robert D. Raven, President, American Bar Association, to the Questions Submitted by Senator DeConcini:

1. The American Bar Association policy is in general accord with the observation of Justice Marshall regarding the undermining effect of civil RICO on the securities laws. We believe that easy resort to civil RICO is equally undermining of commodities and antitrust law. In all these areas, federal and state laws provide comprehensive remedies for victims. The federal securities laws reflect the careful crafting and honing of an extensive body of law developed over a half-century. The antitrust laws were developed over a seventy-year period. Although remedies under the Commodities Exchange Act were enacted more recently, in 1982, they too represent a carefully crafted body of law balancing the need to compensate investors who suffer damages with the need to protect investment firms from excessive exposure to liability. The use of wire and mail fraud as predicates, in particular, combined with the many definitional problems in the RICO statute have clearly resulted in the use of civil RICO to bypass the checks and balances in these areas of law. I would again bring to your attention the results of the 1985 survey of civil RICO decisions by the ABA Business Law Section Ad Hoc Task Force on civil RICO. It found that only 9 percent of 300 civil RICO decisions through 1984 involved allegations of criminal activity generally associated with professional criminals and criminal enterprises. Fully 40 percent of the cases involved allegations of securities fraud properly within the realm of the securities laws.

2. Statistics kept by the Administrative Office of the U.S. Courts and testimony before this Committee June 7, 1989 and before the House Judiciary Subcommittee on Crime May 4 and June 15, 1989, have substantiated the fact that civil RICO abuse has worsened since the 1985 ABA survey. Both in terms of numbers of cases and application of civil RICO in specific cases, there is ample evidence to conclude that civil RICO is a blunt instrument being used to resolve conflicts requiring more precise legal tools.

We believe further that civil RICO abuse is systemic -- that overbroad reach of the statute to almost any type of dispute is resulting in a federal jurisprudence contradicting the most basic principles of law. The civil RICO statute is vague, unclear, unreliable, inconsistently applied and productive of results that are often extreme and unfair.

3. The ABA suggests that the standard for determining whether a business-to-business RICO suit is unreasonably brought is the standard of "substantial justification" used in lawsuits brought against the Government to recover attorneys' fees under the Equal Access to Justice Act. 28 U.S.C.A. §2412. Under this standard, substantial justification has been determined by the courts using a reasonableness test. This test breaks down into three parts:

1. Did the Government have a reasonable basis for the facts alleged?
2. Did the Government have a reasonable basis in law for the theories advanced?
3. Did the facts support the Government's theory?

United States v. Yoffe, 775 F. 2d 447, 450 (1st Cir. 1985).

In "borderline cases," courts will look to several factors to determine whether the Government's position was substantially justified: the clarity of the governing laws; the forseeable length and complexity of the litigation; and the consistency of the Government's position. Spencer v. National Labor Relations Board, 712 F. 2d 539, 559-61 (D.C. Cir. 1983). Also, the Government has the burden of proof on the issue of substantial justification. United States v. Community Bank and Trust Co., 768 F. 2d 311, 314 (10th Cir. 1985).

This standard is well settled and has been utilized often to determine similar questions to those brought under RICO. We suggest that it be utilized as well in S. 438.

The ABA also believes that the approach taken in S. 438 which permits only single damages and does not permit the recovery of attorneys' fees in a business-to-business suit is also quite helpful in eliminating unreasonable civil RICO suits.

4. The ABA has not formally addressed the desirability of a federal treble damages fraud statute. However, we strongly believe that the de facto use of civil RICO to federalize state common law fraud actions is bad policy. The state courts have traditionally had jurisdiction over contract and tort matters which are the real basis of dispute in a large proportion of federal civil RICO actions. We believe that recognition of this misuse of civil RICO is what led Chief Justice William Rehnquist this spring to publicly advocate Congressional reform of civil RICO to relieve the overburdened federal courts of cases which lack a compelling basis for federal jurisdiction.

Written Response of Robert D. Raven, President, American Bar Association, to the Questions Submitted by Senator Humphrey:

The ABA has not yet formally considered the implications of the use of civil RICO against persons engaging in political protests or demonstrations. However, since we are on record calling for substantial reform of civil RICO because of its overbreadth, we share your view that it is being misapplied in disputes in which it acts to damage the jurisprudence that has traditionally -- and for centuries in the case of the First Amendment -- supplied our remedies. It should surprise no one who is familiar with civil RICO litigation that this all-too-readily available tool is being resorted to in what appear to be ideological disputes. We share your concerns and hope to supply you with a more formal response in the future.

Senator DeConcini. The Senator from Iowa.

Senator Grassley. Yes. Mr. Twist, I want to ask you a few questions. Perhaps you heard my opening remarks, in which I suggested that there is evidence that RICO has been used for purposes beyond its original intent as enacted in 1970.

So, I would like to have you explain why you might believe that the present use of the civil RICO statute comports with the Congress' original intent?

Mr. Twist. Well, Senator, let me refer to, if I may, the Fourth Circuit opinion in *HMK Corp.* v. *Walsey*. The court, in quoting another one of its opinions, said that Congress' intent was that RICO serve as a weapon against ongoing unlawful activities whose scope and persistence pose a special threat to social well-being.

I believe that is an accurate reflection of Congress' original intent, as stated by the fourth circuit. And in that regard, to be sure, we can all identify cases that don't fit within that original purpose, but limiting the right of criminal fraud victims to sue under RICO would not be consistent with that formulation of Congress' original intent.

Senator Grassley. Now, it has been noted that damage to property has recently been used to establish under the provisions of the RICO statute, and I quote, "an ongoing criminal enterprise or pattern of racketeering activity in order to gain treble damage awards," such as in recent pro-life demonstrations.

Now, as I stated earlier, no one defends the intentional damage caused to property by demonstrators of any political stripe. However, how do we balance the rights of those who should be able to have access to the courts to recover for legitimate losses, with the free speech rights of those who want to use civil disobedience as their means of protest, if you consider what the term "racketeering" means?

Mr. Twist. That is a difficult question, Senator, and I am very sensitive to the concerns which you expressed about the application of the statute, particularly in the prolife demonstration which you mentioned.

But I think if you go back to the basics of the RICO statute and remember that there is no—and, again, to use Senator DeConcini's words—properly stated RICO claim without an allegation of conduct which is already a violation of the Federal criminal laws, then the question is whether or not a treble damages remedy for the victim of a violation of a Federal criminal statute is appropriate.

Yes, we should sanction the filing of frivolous claims and unfounded claims, and perhaps in the cases that you cited a codified version of rule 11 would be applied to sanction the person who filed that unfounded claim.

On the other hand, to eliminate it entirely for legitimate victims when the problems in this country are so immense right now in our marketplace, I just think it would be very unwise public policy.

And we are eager as the National Association of Attorneys General to work with you and this committee on coming up with a meaningful reform that won't eliminate the statute for legitimate victims of fraud and better protect against some of the abuses.

Senator Grassley. OK. Then I think you made something clear to me in your last statement that wasn't clear before. Your association is working toward revision of the statute. You aren't opposed to our attempts to revise it and to clarify congressional intent?

Mr. TWIST. Mr. Chairman, Senator Grassley, not at all. We are anxious to work with you. We don't believe that the legislation, as currently drafted before you—while some parts of it are good, much of it, we believe, is unsound.

On the other hand, we recognize the motivations behind it and we are willing and eager to work with you to try to come up with a piece of legislation that State prosecutors around this country can get behind.

Senator GRASSLEY. You have already heard me refer to the Chief Justice's recent writings on the status of the operation of the RICO statute. Do you think he is just concerned with minimizing the caseload that comes before the Federal courts or is he speaking to broader issues?

Mr. TWIST. Mr. Chairman, Senator Grassley, first of all with regard to minimizing the caseload, I think, again, testimony has been submitted before the committee to show that the so-called flood of RICO litigation is nothing approaching that. So I don't think that would be what motivated the Chief Justice to make his remarks. And I am sure that he was sincere, very sincere, in his urge to the Congress to consider reform.

On the other hand, take a look at the context in the whole statement out of which that quote was taken. He precedes the quote to which you refer by noting that some reformers have urged, and then he goes through a couple of the potential reforms, like, for example, a codified definition of the pattern requirement, which he says would go a long way to restrict the ability of abusive litigants to file frivolous cases.

He further mentions a codified sanction with up to double damages for people who file frivolous cases. And then he goes on to say I don't know which one of those reforms or which of these reforms would be the most appropriate. He not once mentions many of the things that are included in the legislation before you or in the House counterpart.

And, in fact, when the Court has had an opportunity to address this formally in opinions, for example, in footnote 9 on the issue of the prior criminal conviction requirement, it has criticized the concept.

Senator GRASSLEY. Mr. Raven, Senator Thurmond had three questions, but you have already spoken to two of them.

Senator Thurmond would like to know the opinion of your association as to the retroactivity language in the proposal before us.

Mr. RAVEN. We have not taken a position on that, so I have a personal opinion, but not for the ABA.

Senator GRASSLEY. Mr. Twist, Senator Thurmond had three questions. One, you have already spoken to. You mentioned that over half the States have adopted RICO statutes.

Do the majority of these States allow for automatic treble damages for private civil actions?

Mr. TWIST. Mr. Chairman, Senator Grassley, I believe of the 27 or 28 States that have now enacted State RICO's, 22 of them allow for private civil remedies. I do not believe that all of those allow for automatic treble damages, but I would be happy to submit to you a complete list, or perhaps later Bob Blakey may be able to tell you off the top of his head. But I will submit those to you in writing, which States do and which States don't.

Arizona's does, by the way, and our statute, unlike the Federal law, does not even require a pattern of racketeering activity. One act of racketeering is sufficient under the Arizona law for a private plaintiff to get treble damages.

Senator GRASSLEY. Perhaps the next question would be best answered in writing. Senator Thurmond wanted to know briefly what are some of the major differences between State RICO laws and our Federal statute. So why don't you respond to that in writing for Senator Thurmond?

Mr. TWIST. Yes, sir.

Senator DECONCINI. The Senator from Alabama.

Senator HEFLIN. I notice that there have been some changes made from the bill that was introduced last year, and to Mr. Raven, I would like to direct these questions. In a classification of plaintiffs where business-against-business suits are filed, you have to qualify the predicate, but in those cases under this bill the plaintiffs are limited to actual damages and no punitive damages at all, and they are not allowed to sue for attorneys' fees and attorneys' fees can't be obtained.

What is the position of the American Bar?

Mr. MANNINO. The American Bar Association, Senator, does support the limitation to single damages in a business-versus-business suit. You still have access to the Federal courts. You still have the ability to take the discovery that is very much more liberal in most cases, as you know, in the Federal courts.

And I believe the statute does permit the recovery of attorneys' fees in one of those cases, a business-versus-business case. The only difference is the detrebling, unless that has been changed recently.

Senator HEFLIN. It is my understanding that they do not allow for attorneys' fees. Is that right?

Mr. TWIST. That is correct, Senator.

Mr. MANNINO. That has been changed from the draft.

Senator HEFLIN. Well, what would be the position of the American Bar on that?

Mr. MANNINO. Our position was that business-versus-business suits would be single damages and recovery of attorneys' fees.

Senator HEFLIN. Well, why would you have single damages, actual damages, as opposed to an instance that justified some punitive damages?

Mr. MANNINO. Because we believe that in the types of cases that are getting into the Federal courts, contrary to what Mr. Twist has said, these are run-of-the-mill, mostly contract and tort actions.

I have tried some of these cases, and it would be a big surprise to my clients that these were not contract cases. As a matter of fact, in one of them the court, after discovery, after trial as the case was going to the jury, gave a directed verdict.

What happens is many defendants in a straight contract or tort case pay enormous legal fees to lawyers to defend them and ultimately get a directed verdict. I think if you are in the trenches and you have seen these cases, there are some very legitimate cases, and that is why we think that this is a very good compromise to preserve both the cases that ought to be in Federal court with single, double or treble damages on the one hand and those cases that ought to be in the State courts.

As a former jurist, I believe you know that the State courts are very helpful and able to take care of contract and tort remedies, and the mine-run of these cases that we see in business-versus-business cases are contract or tort cases.

Mr. RAVEN. May I add a comment to that?

I think to a large extent the problem seems to be that cases in which there are remedies now in the State court or in the Federal court under security laws or under antitrust laws or other laws, especially the security cases are being brought under RICO to get these larger damages and attorney fees, and I don't think it is good policy to hold out that kind of an option to people.

Mr. MANNINO. In fact, a lawyer is probably guilty of malpractice if, as a plaintiff, he has a potential RICO claim and doesn't bring that claim. So rule 11 is counterbalanced by the attorney's concerns about possible victimization as a malpractice defendant himself.

Senator HEFLIN. I notice also the change that has been made pertaining to the standard of proof for punitive damages. Last year, the standard was basically "conscious or wanton," and this time it is "consciously malicious and so egregious and deliberate that malice may be implied."

It seems to be much more difficult, even with predicates, to be able to use as a standard, the standard you would have to meet relative to recovery, when allowed. Why the change, and what is the American Bar's position on it?

Mr. MANNINO. We had not taken a position on the standard. I think, quite frankly, the standards are different in words but not significantly in substance. As the chairman pointed out, this was taken from a decision in the Supreme Court of Arizona, and we have no problem with the standard.

We have problems in who makes the determination as the trier of fact, and we believe—and you have seen this in the asbestos cases, for example, where one judge in the district of New Jersey recently said that a punitive damage award was unconstitutional because it had been repetitively awarded against asbestos companies.

We think that a judge applying this would have a much better, salutary effect in limiting those additional or punitive damages to cases where they are appropriate, as opposed to leaving it up to a jury to decide, particularly on a very general charge, as would be the case under this statute. But I think in terms of the standard, we have no problems with either the old standard or the new standard.

Senator HEFLIN. Well, there is some difference in the standard between clear and convincing evidence and the preponderance of the evidence that is allowed under the classification dealing with Government plaintiffs where it is a preponderance, and the other one being clear and convincing evidence.

Well, I was interested in why those changes are being put in the current version of the bill.

Mr. MANNINO. I think it is fair to say that they were not changes that any of the people sitting at this table made.

Senator HEFLIN. Thank you.

Senator DECONCINI. Let me assure the Senator from Alabama that I would be glad to work with him and his staff regarding these changes or changes to these changes. We tried to make it a little less attractive as an incentive to get into the Federal court, and maybe the Senator has some good suggestions on altering that.

Thank you, gentlemen, very much for your testimony. It has been very, very helpful.

Our next panel will be Mr. James Harrison, Sr., president and CEO of First Community Bancshares, of Princeton, WV; Mr. Ernest Dubester, legislative representative, AFL–CIO; Mr. Kenneth Feinberg, court-appointed special RICO settlement master; and Mr. Philip Lacovara, chairman, business/labor coalition for RICO reform.

Gentlemen, we have a little bit of a time constraint, so I would ask that your full statements will be inserted in the record and that you summarize in 5 minutes, if you will, please. We will start with Mr. Harrison.

STATEMENT OF A PANEL CONSISTING OF JAMES L. HARRISON, PRESIDENT AND CHIEF EXECUTIVE OFFICER, FIRST COMMUNITY BANCSHARES, INC., PRINCETON, WV, ON BEHALF OF THE AMERICAN BANKERS ASSOCIATION; ERNEST DUBESTER, LEGISLATIVE REPRESENTATIVE, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, WASHINGTON, DC; KENNETH R. FEINBERG, COURT-APPOINTED SPECIAL RICO SETTLEMENT MASTER, WASHINGTON, DC; AND PHILIP A. LACOVARA, CHAIRMAN, BUSINESS/LABOR COALITION FOR CIVIL RICO REFORM, WASHINGTON, DC

Mr. J. HARRISON. Thank you, Mr. Chairman. I am Jim Harrison, president and CEO of First Community Bancshares, and we are headquartered in Princeton, WV. I am here on behalf of the ABA, and the ABA's position on RICO reform is furnished in my written testimony.

Senator DECONCINI. That is the American Bankers Association?

Mr. J. HARRISON. I am sorry; the American Bankers Association.

Senator DECONCINI. OK.

Mr. J. HARRISON. Rather than review those printed statements, what I would like to do is share with you a moment the perspective from a victim of civil RICO litigation. We are a small bank holding company with total resources of approximately $300 million operating community banks in and throughout West Virginia.

A lot of what we have to sell as community bankers is the trust and respect of our customer base. That confidence and trust and respect takes many, many years to build and it is critically important to our existence and success into the future.

We have been the target of two RICO actions, one filed in 1983 and a second one filed in 1987. Let me share with you that the mere allegation that we would participate or associate ourselves in any racketeering or criminal activity does the damage. The actual outcome of the cases is less important than the actual damage to reputation by the accusations.

In the first suit brought against us, we were sued for approximately $7 million in an effort to stop foreclosure. We won the suit. We prevailed at the Federal court level and through the Fourth Circuit Court of Appeals, but the bank that was sued is still feeling the negative impact of the accusations made in that claim.

We have talked this morning about pursuit under rule 11. In that case, the attorney who brought the suit, in our words, was playing poker with contingent fees. He had no resources to pursue after it was over. In that case, also, we were awarded a directed verdict at the Federal court level. We won on every charge. Each charge was dismissed in the claim, but I hold with you that we are still suffering from the losses in that case.

The second case in 1987 is still in the process of discovery. The total resources of our corporation are $300 million. The suit brought was for $321 million, two-thirds of which, of course, is resulting from RICO allegations.

You can believe that, after the press coverage amply presented that to our public, created the need for panicked employee meetings, panicked board meetings, and a lot of marketing work to reassure our customer base, many of whom are elderly, that we were going to be in business a month out and on into the future.

What is horribly frustrating to us is that the bank sued in this second suit in 1987 is 115 years old. In our market, it absorbed the three other banks during the Depression, was the only one to survive. It has long been the center of every civic, community or economic development effort that has been done in the market.

And although we don't anticipate losing, when we get through this thing, if and when we get through it, much of the damage has been done by the accusations in the original filing.

We hold that the creative use of civil RICO is being used to brutally attack those of us whom it was designed to protect. We think very strongly that the protection provided under other State law in the commercial disputes that have been the subject of our litigation, as well as applicable Federal suits, are much adequate.

The direct impact—there are four or five pieces of direct impact on us as community bankers. The first one is in the first suit, we incurred approximately 350,000 dollars' worth of direct outside charges in preparing for and defending that suit.

The second one, something of that nature, a suit such as the $321 million suit, has absorbed a horrible amount of our internal efforts in preparing for an adequate defense. The undue pressure to settle a suit of that nature, to keep it out of the public from an image standpoint, goes without saying, as well as the impact, waiting on the Supreme Court to decide various RICO issues—the impact to drag out the litigation.

But as importantly and more subtly, we have a serious concern because internally we are getting tired of being the butt of this type of accusation. We are the lenders in every market that we have banks in. We are involved in the community, and to run the risk of being accused of being a corrupt organization or being involved in organized crime is too much to have to take.

In our cases, we think that the damage to our organization, its image, and the level of trust and confidence of our customers is done. We would strongly urge reform to the current civil RICO statutes, hopefully, so that we won't be the subject of another brutal attack or that no one else would have to endure the attack that we have faced.

I would like to thank you for the opportunity to be here, and would welcome questions.

Senator DECONCINI. Thank you, Mr. Harrison, and I will have a question or two. I think I will go ahead and take Mr. Dubester and the rest of the panel.

[The prepared statement of Mr. J. Harrison follows:]

TESTIMONY

OF

JAMES L. HARRISON, SR.

ON BEHALF OF

THE AMERICAN BANKERS ASSOCIATION

BEFORE THE

SENATE COMMITTEE ON THE JUDICIARY

ON

CIVIL RICO REFORM

JUNE 7, 1989

Mr. Chairman and members of the Committee, my name is James L. Harrison, Sr. of Princeton, West Virginia. I am President and C.E.O. of the First Community Bancshares, Inc. in Princeton.

Today, I am appearing on behalf of the America Bankers Association to generally present the views of our members on the need for civil RICO reform and more specifically on the experiences of my institution in trying to perform the business of banking with the spectre of abusive civil RICO litigation facing us at every turn. The American Bankers Association is a national trade association whose members combined assets comprise approximately 95% of the total assets of the commercial banking industry. While our members range in size from the smallest to the largest banks, some 85% have assets less than $100,000,000.

As the Committee is well aware, RICO was enacted 19 years ago as a tool for fighting crime by attacking organized crime in its efforts to infiltrate legitimate business. Among other things, the law provided a civil remedy to victims of the kind of racketeering activity prohibited by the statute. A successful plaintiff in a RICO case is entitled to treble damages, court costs and attorney's fees. The intent of the law was, and is, a worthy one, which the banking industry fully supports.

However, the intent of Congress in passing the RICO statute has been abused by private plaintiffs who misuse the statute and harm legitimate businesses such as First Community Bank. Members of Congress have agreed, stating that "civil RICO is truly a statute run rampant." The Chief Justice has also decried the abuse of RICO pointing out that "Congress never intended that civil RICO should be used, as it is today, in ordinary commercial disputes far divorced from the influence of original crime." It is clear that plaintiff attorneys have turned ordinary state common law commercial disputes into federal racketeering cases, and thus have turned the statute on it head.

The American Bankers Association has long been a proponent of RICO reform. Representing the concerns of the commercial banking industry, the ABA is part of a broad-based coalition -- including manufacturing, accounting, civil liberties, insurance, securities, commodities legal and consumer products that all support the RICO reform effort. ABA and the coalition support S. 438 as the legislation that stands the best chance of being enacted by the 101st Congress.

I will not reiterate ABA's and the coalition's position on S. 438. The members of this Committee have been continually apprised of that position and will hear from other distinguished panelists about the need for RICO reform. It may be a better use of the Committee's valuable time for me to discuss a "real-life" story on the abusive practice of civil RICO. I hope that the Committee will fully understand the actual abuse (not just its potential) that exists with RICO statutes today and that the 101st Congress, as Senator DeConcini has argued will "be the one in which some sanity is brought to the RICO morass."

Before summarizing our institution's experience with civil RICO abuse, I would like to quote from a letter received by the ABA and members of Congress from another community banker who has been the victim of civil RICO. The banker was expressing his frustration when he wrote:

> "It is sad when the day has come that forthright and honest business men and women have to live in an environment where they can be publicly ridiculed as "Racketeers" and associated with criminals. It is equally sad to be exposed financially to such unjust remedies. We have taken the opportunity to express our views on occasion in support or against different issues before the legislature. However, our views on this issue are derived from true real experiences and not from a theoretical standpoint. It is because of this and our concern for others who have and will suffer as a result of inaction on the legislature's part, that we strongly urge you to educate yourselves to this issue and pursue its original intent.

> It is because of our own personal judgement derived from personal experiences that we urge you to join in the pursuit of justice in this matter. The overwhelming consequences of this injustice continuing are mounting everyday against honest people and community businesses. Defendants are subjected to extortionate threats of treble damages, which force settlements when claims are weak or even baseless."

Our bank holding company is located in southern West Virginia and has total assets of $300,000,000. Our company has 200 employees and operates 11 offices in four counties within West Virginia and has total capital of approximately $25,000,000. Approximately 75% of our 1,500 shareholders live in West Virginia with the other 25% spread through 35 states across the country. We, therefore, represent a small company measured by any national standards, however, we are typical of businesses throughout West Virginia and most of the country. We have experienced the severe sting of RICO litigation in two lawsuits, one of which we "successfully" defended through the Fourth Circuit Court of Appeals. The other, like the first, is without merit, but is currently in discovery.

The success or failure of a community bank is built upon trust and confidence. While it is true that rates paid and charged for products and services are important, corporate image and perceived corporate character, built over an extended period of time are as important to future successes as any other singular item. The impact of civil RICO litigation imposed by opportunistic plaintiff's counsel will cause irreversible damage to that character and image. In our opinion, abuse of civil RICO has further reaching long-term impact on small business in general and the banking industry in particular.

In 1983, in an effort to stall foreclosure attempts, one of our subsidiary banks was the subject of a $7,000,000 suit which alleged RICO. In 1988, the Fourth Circuit Court of Appeals dismissed these baseless charges. The damage, to our image, however, has yet to be repaired and it will be many years before such repair is possible. It is similar to the old question "when did you stop beating your wife?" Once a financial institution is accused of participation in racketeering activity and this is reported to the general public through local media and probably encouraged by the competition, regardless of whether or not there is any basis for such accusations, the negative impact is felt for many years. In 1981, there were two primary financial institutions in the Buckhannon, West Virginia market; our institution with approximately $60,000,000 in total resources and a competing institution with approximately $70,000,000 in total resources. Today, total resources of our bank in that market is approximately $50,000,000 while that one competitor, still our most active source of competition, is $170,000,000. I will be the first to concede that the entire change in relative deposit sizes of the two banks is not entirely the result of the damage to our image connected to the RICO allegations. However, damage to an institution's image is only a portion of the impact of this type of litigation. Once accused, the defendant must be in a position to defend or deflect the accuser. The pressure brought to a financial institution from the seriousness of racketeering accusations is such that its total resources are consumed in preparing for defense. While these resources are being absorbed, other aspects of the business suffer. In this particular case, literally hundreds of thousands of dollars were spent in fees paid to outsiders, including our accountants and attorneys, to provide the appropriate level of defense. This does not include the untold number of personnel hours consumed within the bank itself.

In 1987, our bank in Mercer County instituted an action to recover a piece of property that it felt had been improperly excluded as collateral on a substantial loan. The defendant counterclaimed for damages of $321,000,000 including treble damages under RICO. Our total corporate resources are approximately $300,000,000. With a suit of such magnitude comes extensive press coverage, and in this case a copy of this action mysteriously appeared on the desk of the newspaper editor thus ensuring that it would draw appropriate media attention. It was necessary for us to hold employee and director meetings to review the aspects of the allegations with them and more importantly, to prepare them to appropriately respond to questions from customers. As a great deal of our banking public are elderly, long-term customers, news release of such a lawsuit prompted a great deal of concern as to the safety and soundness of the bank and as to whether or not they should continue as customers or for protection move their banking, primarily deposit relationships, to other financial institutions.

Our Princeton affiliate is approximately 115 years old, the only area bank surviving the depression, absorbing the other three financial institutions in our communities and is and has been the center of all civic, community or economic development activity in the marketplace. Having to defend ourselves as not being part of a racketeering element as a result of the allegations in this suit and in the media, was not only frustrating but should have never been necessary. To date, we have not seen one iota of merit to plaintiff's claims in this suit. Most importantly, much of the damage to our 115 year old character building process has been done.

It is my opinion (and that of the entire coalition) that Congress never intended RICO penalties to be attached to litigation against bona fide business organizations. We are subject to regulation by the Federal Reserve Bank of Richmond, the State Banking Department of West Virginia, as well as the Federal Deposit Insurance Corporation. Abuses of any type against either individual consumers or business organizations with which we do business would subject us to increased scrutiny as well as possible punitive action. In addition, West Virginia and other state laws provides many substantial avenues for a plaintiff to seek protection without alleging RICO.

It is increasingly frustrating to me that through the creative utilization of RICO statutes by plaintiff counsel, we have turned a tool which Congress intended to retard racketeering activities into one which is being used in brutal attack by those who are attempting to defraud legitimate businesses and as in our case, financial institutions. So much of a bank's ability to operate successfully depends upon image and reputation and upon the trust and respect of its customers. Accusations of activities associated with racketeering and corrupt organizations is a bitter pill.

I would like to address for just one moment what we perceive as the long-term impact of RICO litigation against banking institutions and the current environment of lender liability as well. The most obvious element to address, of course, is the direct cost associated with defense of this type of action. Treble damages and the risk of suffering even a portion of such claims at the hands of an uninformed or unsympathetic jury creates the need to pour an inordinate amount of cost into professional fees to provide for adequate defense. In the case of our Buckhannon affiliate, we estimate the total cost in that matter as between $350,000 and $400,000. Again, remember this is a $40,000,000 bank. In the case of the $321,000,000 suit we would estimate the cost to be between $250,000 and $400,000 for the defense. These expenses, when coupled with the untold hours necessary to prepare for defense, has dramatic impact on both the operations and economic stability of the bank.

The threat of a RICO action creates undue pressure for a financial institution to settle even a case that is without merit. In new situations where there is potential for litigation against our banks, we look carefully to the possibility of someone alleging RICO activity and this, without question, influences our decisions as to how to negotiate resolution rather than risk the potential of litigation. This, of course, again adds to the cost of settlement.

Both of these items, direct expenses and increased pressure to settle cases with little or no merit, have an adverse impact on the safety and soundness of an ongoing financial institution. It is our experience that RICO allegations arise in dealings with customers who have already created losses on the part of the bank in that they could not meet their loan obligations. In one case, for a period of 4 1/2 years, we were stopped from pursuing collateral on loans until all litigation was resolved. The RICO aspect of this litigation and the Court's position that certain Supreme Court cases should be decided prior to that Court ruling on the issues, added almost three years to the time necessary to resolve those issues. During that time the collateral value underlying the original loans was creatively diminished by the plaintiff so that upon our receiving access to the collateral there was very little value remaining.

In the second case, the primary collateral was obtained by the bank at a foreclosure sale. However, a substantial loss was experienced and the above-mentioned counterclaim was filed pleading RICO to stop us from recording judgement liens to allow us access to other valuable collateral of the plaintiff corporation. We currently are being sued in a State Court in our local community and are most concerned that the racketeering and corrupt charges being paraded to a local jury will have an increasingly negative impact on our image and market presence. We requested that the RICO charges be remanded to a Federal Court and, of course, this question remains unresolved pending Supreme Court action. During the time extension brought into this matter by the RICO charges, it is our concern that the plaintiff corporation will be exhausted of bona fide recoverable assets and once this case is over and we are able to record the appropriate judgement deficiencies, there will be no assets left for the bank to obtain. The stall tactic ability of RICO action works for those whose sole desire it is to defraud a financial institution of assets which should be rightfully the property of that financial institution.

More subtle than losses measured in dollars and cents, we are concerned that civil RICO litigation, coupled with lender liability, will have an even greater negative impact on small business as we know it today. In each geographic area in which we operate a bank, we are known as THE lending institution. We see a significant portion of our role, as a community bank, as supporting our geographic areas through lending activities. In many of our situations, of course, we are approached by individuals who have dreams and ideas and hopefully, energy, but little equity and most times no sources of liquid capital. The request to us is to underwrite their ideas with capital. In our markets, as is true in most rural markets throughout the country, small business comprises the entire employment base and is really the economic nucleus of the area. We are currently reviewing our lending posture in light of new lender liability litigation and our recent experiences with RICO actions to determine whether or not we want to continue to be the lending organization in our geographic areas. We cannot afford to be subjected to the accusation that we participated in racketeering activities or that we are a corrupt organization. We are tired of the abuses that misuse of the RICO statute has provided and feel strongly that unless some relief is granted, our banks as well as others like us throughout the country will find it necessary to become less supportive of small business in the years ahead. One simply cannot economically afford the impact that this has on both the image and economic stability of their organization and prudence tells us that it would be wise to be much less supportive of small business. Sources of capital for the types of small businesses that we deal with on a day-in, day-out basis are scarce. If community banks are not willing to work with these individuals, taking reasonable risk to supply such capital, small business as we know it today will not exist in the future. This will have a severe negative impact on the economic structure of the areas in which we operate and we strongly suggest that careful attention be given to the impact of civil RICO on financial institutions as well as small business in general.

Whatever action Congress ultimately decides to pursue should give due regard to the original intent of the enactors in 1970. That is, giving victims a remedy against organized criminal infiltration of legitimate business, while at the same time limiting the effect of the statute, to that important goal. That the problem be solved, however, and solved quickly, is more important than the precise method chosen for solving it. The American Bankers Association will support any legislative initiative which will leave the remedy for garden variety commercial disputes to state common law or to applicable federal statutes, where it belongs.

Thank you, Mr. Chairman, for the opportunity to present our views to the Committee. I will be pleased to answer any questions.

ABA Bankers Weekly

February 21, 1989

Time to reform RICO

Key members of the House and Senate are poised to introduce legislation to end appalling abuses of the Racketeer Influenced and Corrupt Organizations Act, and ABA and many other groups are primed to give aggressive support to this much-needed reform legislation.

From the chief justice of the Supreme Court to the Department of Justice to hundreds of federal judges to thousands of business owners that have been victimized by the abuse of RICO, there is incredibly broad support for reform of this law. When RICO was enacted into law in 1970, the intent of Congress was to fight the infiltration of legitimate businesses by organized crime.

What has happened instead is that resourceful attorneys have bent the law by claiming that otherwise routine business disputes are part of some alleged pattern of corrupt activity. Bingo! That allegation converts run-of-the-mill state-level civil lawsuits into federal litigation, with the gleam of treble damages fueling the process. Approximately 1,000 of these civil RICO cases sprout each year.

When the matter came before the U.S. Supreme Court — without, unfortunately, any final resolution of the abuse of RICO — the court observed that "Many a prudent defendant, facing ruinous exposure, will decide to settle a case with no merit. It is thus not surprising that civil RICO has been used for extorsive purposes, giving rise to the very evils that it was designed to combat."

The case for reform of civil RICO has been made, and the facts are not in dispute. Key members of Congress who are familiar with these issues are seeking action, and their colleagues should join actively with them.

— **Ed Smith, Publisher**

STATEMENT OF ERNEST DUBESTER, LEGISLATIVE REPRESENTATIVE, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

Mr. DUBESTER. Thank you, Mr. Chairman. I appreciate this opportunity to present the views of the AFL–CIO in support of S. 438. In our view, this bill represents a significant and a necessary step toward curbing the rampant abuse of the private civil RICO action, and it does this in our view, namely, by narrowing the class of those private civil RICO actions in which treble damages, costs of litigation, and attorneys' fees may be recovered by plaintiffs. So while we feel that other reforms of the private civil RICO action are needed, we urge this committee to give favorable consideration to S. 438.

We also wish to emphasize at the outset that S. 438 quite properly, in our view, addresses the peculiar problems posed by private civil RICO actions separately from those very different issues that arise in civil RICO actions brought by governmental authorities or in those cases in which criminal RICO prosecutions are brought.

Under the broad terms in which Federal law enforcement authorities are provided the means through the criminal laws to reach organized crime and its assets, one safeguard, as we understand it, is the responsible use of prosecutorial discretion. But, unfortunately, that safeguard is not available in the context of private civil litigation, and we feel that whatever the wisdom of placing such broad power in the hands of governmental authorities, our experience has shown that placing the same power in the hands of private parties whose objective is not to further society's interests in coherent and effective law enforcement, but rather to further their own interests, can be reckless to the extreme and often is destructive to innocent parties and, in our view, contrary to the goals that RICO was intended to accomplish.

Now, the AFL–CIO has had perhaps a unique opportunity to observe how the private civil RICO action works. Unions affiliated with the AFL–CIO have been both plaintiffs and defendants in private civil RICO actions. Employers and unions are constantly adding the private RICO action to the arsenal of weapons available for use in what are otherwise labor-management disputes.

A current labor-management dispute that has improperly turned into a private civil RICO action is that brought last year by the Texas Air Corp. against the Airline Pilots Association and the International Association of Machinists which grows out of the longstanding labor dispute with Eastern Airlines.

As you are aware, Mr. Chairman, that dispute has been a difficult one. Emotions are running high on both sides. But regardless of how one may view the merits of the dispute between labor and management in that instance, in our view it certainly does not go to the kind of enterprise criminality or the core conduct that the civil RICO statute was designed to address.

Senator DECONCINI. Excuse me for interrupting you. You are saying that it has a chilling effect on what might be legitimate collective bargaining. Is that a fair statement, and has it had that effect on the Eastern case?

Mr. DUBESTER. I think that is a fair statement. I think it has several unfavorable consequences. Your characterization is an accurate one. I don't want to try to be unfair in my assessment, but I think what it tries to do, and I think what we often see is the case, is it trying to give one side in a labor-management dispute an unfair advantage in a way that undermines the basic principles of Federal labor laws as they have evolved over a period of 50 or 60 years.

Senator DECONCINI. It might be used by either side, for that matter.

Mr. DUBESTER. That is correct, Senator, yes.

Senator DECONCINI. Go ahead.

Mr. DUBESTER. And so at a time in that instance, for example, when we are all striving through the difficult situation of trying to get the airline back to full operation, the situation is further complicated by the litigants being trapped in the unmanageable morass of complicated factual and legal issues. And we would suggest that the burden that this kind of litigation imposes on the parties and ultimately on the courts is not justified by any corresponding social benefit.

So I would just summarize by saying that our experience from that case and other cases that we are all aware of reflects that the private civil RICO action, Mr. Chairman, rarely gets at the kind of conduct that the statute was originally designed to address.

I believe that the general availability of treble damages, as well as litigation costs and attorneys' fees that are currently available to the plaintiff, is what gives the private civil RICO action its extortive force, and we feel that by at least addressing those problems this bill would take a significant step in the right direction.

We also have attached to my testimony a letter that we wrote to Congressman Conyers in 1985, who was then the Chair of the House Judiciary Committee's Criminal Justice Subcommittee, in which we expressed some of our other concerns with the shortcomings of the substantive aspects of the civil RICO statute.

We hope that after we can get S. 438 enacted into law that perhaps Congress will address some of those shortcomings, and I would ask that that letter would be attached to my statement.

Senator DECONCINI. It will be attached.

Mr. DUBESTER. And I would just say that in our view, the most desirable response to the present situation would be to repeal the private civil RICO action in its entirety. But failing that, we would hope that Congress would view S. 438 as being a first sensible step to help us curb the worst excesses of the current use of private civil RICO.

Senator DECONCINI. Let me ask you one question. One of the consistent claims by opponents to civil RICO reform is that inappropriate civil RICO suits will be dismissed by the court on a threshold motion to dismiss.

What is the experience that labor organizations have had in this regard, if any?

Mr. DUBESTER. Well, I think, again, just to refer to an example that is in the minds of the public as well as us, in our view we thought that there were good grounds—and let me clarify that I am not involved as a lawyer in the current suit between Texas Air and the pilots and the machinists unions, but it was our assessment and my assessment that given the pleading in that case and the facts in that case, as we understood them, that it perhaps warranted a dismissal at the threshold.

Senator **DeConcini**. And a motion was made and denied.

Mr. **Dubester**. The motion was made to dismiss that suit and it was denied. We haven't gotten a written opinion yet from the judge explaining his rationale and we are awaiting that. But, nonetheless, it has been denied.

Senator **DeConcini**. And do you know of other experiences as well?

Mr. **Dubester**. I think we have had some comparable experiences along those lines.

Senator **DeConcini**. Would you care to submit several examples?

Mr. **Dubester**. I would be happy to do my best to provide the committee with that information, yes, Senator.

Senator **DeConcini**. Thank you.

[The prepared statement of Mr. Dubester follows:]

STATEMENT BY ERNEST DUBESTER, LEGISLATIVE REPRESENTATIVE, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, BEFORE THE SENATE JUDICIARY COMMITTEE ON S. 438, A BILL TO AMEND THE CIVIL PROVISIONS OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO)

June 7, 1989

The American Federation of Labor and Congress of Industrial Organizations appreciates this opportunity to present its views in support of S. 438.

This bill, in our judgment, represents a significant and necessary step toward curbing the current rampant abuse of the private civil RICO action: a narrowing of the class of private civil RICO actions in which treble damages, costs of litigation, and attorney's fees may be recovered by a plaintiff. For that reason, while we believe that other reforms of the private civil RICO action are also needed, we urge the Committee to give favorable consideration to S. 438.

At the outset, we wish to emphasize that the bill -- quite properly in our opinion -- addresses only the peculiar problems posed by private civil RICO actions, leaving to another day the very different issues respecting civil RICO actions brought by governmental authorities and those respecting criminal RICO prosecutions.

RICO's substantive provisions were fashioned in the broadest terms to provide federal law enforcement authorities a means through the criminal laws to reach organized crime and its assets. The net was cast as wide as possible, with the safeguard against abuse being the responsible use of prosecutorial discretion.

That safeguard is not available in the context of private civil litigation. Whatever the wisdom of placing such broad power in the hands of governmental authorities, experience has shown that placing the same power in the hands of private parties whose objective is to further their own interests, rather than society's interest in coherent and effective law enforcement, produces results that are both destructive to innocent parties and contrary to the goals RICO was intended to accomplish.

The AFL-CIO has had perhaps a unique opportunity to observe how the private civil RICO action actually works. Unions affiliated with the AFL-CIO have been both plaintiffs and defendants in such suits, as employers and unions have added the private RICO action to the arsenal of weapons available for use in the context of labor disputes. Perhaps the paradigm example of this sort of adventitious use of the private civil RICO action is the Texas Air Corporation lawsuit against the Air Line Pilots Association and the International Association of Machinists, growing out of the long-running labor dispute at Eastern Air Lines. The experience to date teaches the following lessons.

Congress' motivating objective in enacting RICO was to end the infiltration of legitimate institutions by organized crime. Private RICO actions rarely, if ever, are brought to further that objective. The typical private civil RICO action is between parties to ordinary commercial disputes and labor disputes in which the parties have no relation to organized crime.

In that setting, the private civil RICO action offers a plaintiff a broad-ranging, open-ended means of attack, with the potential of devastating monetary and other remedies, as a substitute for the more carefully limited state and federal causes of action specifically addressed to the kinds of misconduct that such disputes sometimes engender. As Justice Marshall put it in his dissent in _Sedima, S.P.R.L. v. Imrex Co._, 473 U.S. 479, 506 (1985):

> Only 9% of all civil RICO cases have involved _allegations_ of criminal activity normally associated with professional criminals . . . . The central purpose that Congress sought to promote through civil RICO is now a mere footnote. [Emphasis added.]

Indeed, in _Sedima_, though they disagreed on questions of statutory interpretation, all nine justices agreed that, in the words of the Court majority, "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors." 473 U.S. at 500. As Justice Marshall added in dissent, "[t]he central purpose that Congress sought to promote through civil RICO is now a mere footnote," _id_. at 506; and as Justice Powell, also in dissent, put it, "RICO has been interpreted so broadly that it has been used more often against respected businesses with no ties to organized crime, than against the mobsters who were the clearly intended target of the statute," _id_. at 526.

The Sedima majority made clear, however, that "correction [of the statute] must lie with Congress." Id. at 499.

As would be expected, given the nature of the private civil RICO suits that are being brought, their actual results serve none of RICO's overriding objectives. Because of the statute's vague and complex substantive provisions and its far-reaching remedial provisions, the private civil RICO action is the ideal "strike suit." Again, we cannot improve upon Justice Marshall's dissenting opinion in Sedima, 473 U.S. at 506:

> In practice, [the private civil RICO] provision frequently has been invoked against legitimate businesses in ordinary commercial settings . . . . Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat.

Our experience confirms that a private civil RICO action can be an all-too-effective means of coercing a settlement from a defendant who is unwilling to endure the embarrassment, the litigation expense, and the risk of devastating penalties inherent in defending a civil RICO suit. Where a private civil RICO action does not result in a quick settlement, the consequences are likely to be undesirable for all involved: litigants on both sides become trapped in an unmanageable morass of complicated factual and legal issues. The burden that this kind of litigation imposes on the parties and on the court system is not justified by any corresponding social benefit.

More than any other provision of RICO, the general availability of treble damages in RICO actions is what gives private civil RICO its "extortive" force. See Sedima, 473 U.S. at 506 (Marshall, J., dissenting). Particularly in the context of a statute containing broad and vague definitions of prohibited conduct, the threat of a treble-damage award forces even the innocent defendant to consider seriously and often to conclude that there is no sensible alternative to conceding to demands for substantial monetary "settlements." And the knowledge that defendants will react in that fashion is what motivates many private civil RICO actions.

This extortive effect of the treble-damage feature of private civil RICO actions is exacerbated by the general availability of attorney's fees as part of the plaintiff's recovery in such actions. Plaintiffs' attorneys are thus drawn to fashion as RICO actions what would otherwise be ordinary commercial or labor suits in order to provide a means of getting their legal fees. Given the vague substantive contours of RICO, a creative attorney in search of fees can find a way to convert a wide variety of ordinary pieces of litigation into RICO actions. The result is a distortion of our legal system, and in particular a broad-scale and open-ended departure from the "American rule" respecting attorney's fees, viz., the rule that each party is responsible for his own attorney's fees. And again, innocent defendants, faced with the enormous fees that plaintiff's attorneys can generate in a private civil RICO action, may feel compelled to consider and often to accede to a plaintiff's "settlement demands," rather than run the risk of counsel-fee liability which increases continuously as the case proceeds.

S. 438, which limits recoveries in the most common private civil RICO actions to actual damages, is therefore an important step in the right direction. The bill, striking a careful balance, eliminates the treble-damage remedy and the availability of attorney's fees in the categories of private civil RICO actions in which those remedies are most troublesome, while retaining them for application to truly extraordinary situations. In the generality of cases, the bill would serve to eliminate the primary incentive for initiating "strike suits," while at the same time preserving plaintiffs' ability to recover any relief to which they may be rightfully entitled. Make-whole relief, which would continue to be available, is after all the norm in civil cases.

For the reasons stated, enactment of S. 438 would be an important first step in the process of refining RICO. But the enactment of S. 438 would leave unaddressed a variety of other substantive failings from which civil RICO suffers. We continue to believe that these shortcomings should be corrected. And, at the appropriate time, after the first order of business represented by S. 438 has been accomplished, it is our hope that Congress will move to revamp the substantive aspects of the civil RICO statute. We have outlined our views in this regard in a letter addressed to Congressman Conyers at an earlier stage of consideration of amendments to the civil RICO provisions. A copy of that letter is attached hereto.

The private civil RICO action was an afterthought appended to a statute designed to be administered by law enforcement officials acting on behalf of the public and exercising appropriate discretion. In the hands of self-interested private litigants, the private civil RICO action is a blunderbuss that shoots random holes in the carefully wrought scheme of civil remedies whose component parts were designed to address particular needs in a just and equitable manner.

In our view, the most desirable response to the present untenable situation would be to repeal the private civil RICO action in its entirety. Failing that, however, we believe that S. 438 is a sensible first step that will help to curb the worst excesses of the statute, and urge that the Committee give it favorable consideration.

American Federation of Labor and Congress of Industrial Organizations

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October 11, 1985

The Honorable John Conyers, Jr.
Chairman
Subcommittee on Criminal Justice
of the House Committee on the
Judiciary
2237 Rayburn House Office Building
Washington, D.C. 20515

Re: Hearings on H.R. 2517 and H.R. 2943: Bills to Amend the Racketeer Influenced and Corrupt Organizations chapter of Title 18, United States Code, 99th Cong., 1st Sess.

Dear Chairman Conyers:

The American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) hereby requests that its views respecting the private civil liability provisions of the Racketeer Influenced and Corrupt Organizations provisions of the criminal code, set out below, be included in the record of the above noted hearings.

The AFL-CIO has had perhaps a unique opportunity to observe how the private civil RICO action actually works. Unions affiliated with the AFL-CIO have been both plaintiffs and defendants in such suits which are now arising in the labor dispute context, as employers and unions add the private civil RICO action to the arsenal of weapons available for use in such disputes. The experience to date teaches the following lessons.

First, private civil RICO actions rarely, if ever, are brought to attack the core conduct that concerned Congress in enacting RICO. Congress' motivating objective was to end the infiltration of legitimate institutions by organized crime. The AFL-CIO supports that objective. But few if any private civil RICO actions even purport to address such infiltration. The typical private civil RICO action is between parties to run of the mine commercial disputes and labor disputes, in which the parties have no relation to organized crime. See Sedima, S.P.R.L. v. Imrex Co., ___ U.S. ___, 105 S. Ct. 3292 (1985) (dispute over billing practices in joint venture); see also, e.g., Adair v. Hunt International Resources, Co., 526 F. Supp. 736 (N.D. Ill. 1981) (land investment fraud). In that setting, the private civil RICO action offers a party a broad ranging, open ended means of attack carrying drastic monetary and other remedies, as a substitute for the more carefully limited state and federal causes of action specifically addressed to the kinds of misconduct that such disputes sometimes engender. See e.g., Parnes v. Heinold Commodities, Inc., 487 F. Supp. 645 (N.D. Ill. 1980) (circumventing limited remedial provisions of the Commodities Exchange Act). As Justice Marshall put it in his dissent in Sedima 105 S. Ct. at 3295:

> Only 9% of all civil RICO cases have involved allegations of criminal activity normally associated with professional criminals. The central purpose that Congress sought to promote through civil RICO is now a mere footnote. [Emphasis added.]

Indeed, the majority of the Court in Sedima, while giving civil RICO a broad construction and holding that "correction [of the statute] must lie with Congress," went on to "recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors." 105 S. Ct. at 3287.

Second, as would be expected from the nature of the private civil RICO suits that are being brought, their actual results serve none of RICO's overriding objectives. Because of that Act's vague and complex substantive provisions and its far reaching remedial provisions, the private civil RICO action is the ideal "strike suit." As Justice Marshall stated in Sedima, 105 S. Ct. at 3295:

> In practice, [the private civil RICO] provision frequently has been invoked against legitimate businesses in ordinary commercial settings. . . . Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat.

From what we have seen, a private civil RICO action can be an all too effective means of coercing a settlement from a defendant who is unwilling to endure the embarrasment, the litigation expense and the risk of devasting penalties inherent in defending a civil RICO suit.

Third, where a private civil RICO action does not result in a quick settlement, the consequences are likely to be undesirable for all involved: litigants on both sides become trapped in an unmanageable morass of complicated factual and legal issues. The burden on the parties and on the court system of this kind of litigation is not justified by any corresponding social benefit.

For the foregoing reasons the AFL-CIO urges several changes in the civil RICO provisions:

1. We support enactment of legislation along the lines of H.R. 2943. That bill would curb what we regard as the dangerous practice of in effect placing in private hands the prosecution of public crimes. Requiring a criminal conviction for racketeering activity as a prerequisite to a private civil suit would, moreover, deter some vexatious suits and would also end the confusion over the standard of proof to be applied to the predicate crime elements of a civil RICO action. See Sedima, 105 S. Ct. at 3283.

We agree, however, with S.E.C. Chairman Shad that the language of H.R. 2943 should be clarified. The amendment's references to "such conduct" and "with respect to the conduct out of which such action arises" leave it unclear whether the plaintiff must allege that he was harmed by the specific actions upon which the defendant's conviction is based, or whether it is sufficient to have standing to allege harm caused by other asserted, but so far unproven, racketeering activities of the defendant. We would favor language that makes it clear that the plaintiff must have been harmed by the criminal conduct that is the basis of the conviction. Moreover, H.R. 2943's proposal that a conviction for "racketeering activity" be a prequisite to bringing a civil suit could be understood to mandate either that there be a prior conviction on one of the predicate crimes which define "racketeering activity" or that there be a prior conviction on crimes sufficient to constitute a "pattern of racketeering activity." To clarify this point the bill should specify that for a civil suit to lie there must be prior convictions of crimes that constitute a "pattern of racketeering activity" as defined in 18 U.S.C. §1961(5).

2. We join the A.B.A., the SEC, and the others who have urged that there are more fundamental deficiencies in the private civil RICO action that must be corrected.

The basic problem with the civil RICO action lies in the breadth and vagueness of the substantive standards governing the cause of action. RICO's substantive provisions were fashioned to provide federal law enforcement authorities a means through the criminal laws to reach organized crime and its assets. The net was cast as wide as possible, with the safeguards against abuse being the responsible use of prosecutorial discretion. Congress thereafter added to the Act the private civil action. Whatever the wisdom of placing such unbridled power in the hands of federal prosecutorial authorities -- a matter which we strongly urge this subcommittee to consider at the earliest appropriate time -- placing the same power in the hands of private parties whose objective is to further their own interests, not the interest in coherent and effective law enforcement, is we believe, reckless in the extreme.

The following proposed amendments to the substantive provisions governing private civil RICO actions would limit the opportunities for abuse of such actions without diminishing the potential for such actions to serve their intended purposes.

a. (i) Because RICO is directed at combatting a pattern of criminal conduct, the definition of a "pattern of racketeering activity" is the conceptual center of the Act. As presently drafted, a plaintiff may establish "a pattern of racketeering activity" by proving that the defendants engaged in conduct constituting certain specified predicate offenses at least two times; one of these offenses need have occurred after the effective date of the Act, but, apparently, the other can have occurred at any time. A plaintiff may thus seek to prove his case by showing conduct constituting an offense occurring as many as ten, twenty or thirty years before the suit was brought. For all the reasons that we have statutes of limitations, such a result is unacceptable. No defendant can be expected to be able adequately to defend against a charge that he committed a crime of such ancient vintage. Witnesses may have died, documents may have long since been destroyed or lost, and memories in any event will have faded -- few among us can remember what we were doing on a particular day two or three years ago, much less twenty or thirty years ago.

The proposed amendment contained in H.R. 2517, subparagraph (3), would resolve this problem in the criminal context by requiring that both predicate crimes occur within five years of the time the indictment is returned. By analogy, we suggest that for the purposes of civil RICO the Act should be amended to require that the predicate crimes occur within five years of the filing of the complaint. To so limit the action is not to deprive the plaintiff of anything he should have. If the plaintiff cannot show at least two acts of "racketeering activity" occurring within the limitations period, one may properly question whether there is in fact a "pattern" of such activity.

(ii) The definition of "pattern of racketeering activity" should be amended in a second respect as well. The present definition does not specify what if any connection there must be between the predicate acts; it is not clear at what point distinct acts of criminal conduct are to be deemed to constitute a "pattern." _See, e.g._, _United States v. Elliot_, 571 F.2d 880, 889 & n.23 (5th Cir.), _cert. denied_, 494 U.S. 953 (1978). To cure this defect, we urge the adoption, for the purposes of civil RICO, of the language in paragraph (3) of H.R. 2517 requiring that the predicate criminal acts be "interrelated by a common scheme, plan, or motive, and . . . not isolated events." This amendment would give content to the requirement that the acts truly constitute a "pattern."

(iii) At present it is possible to base a RICO claim on two predicate act violations arising out of a single transaction involving, for example, several fradulent mailings. _See, e.g._, _United States v. Weatherspoon_, 581 F.2d 595, 601 (7th Cir. 1978). Indeed, nearly half of private RICO actions have been based on a single episode involving a single victim. _See_ Statement of Deputy Assistant Attorney General John C. Keeney on RICO Legislation before the House Judiciary Subcomm. on Criminal Justice, 99th Cong., 1st Sess. 24 (Sept. 18, 1985). A single episode of wrongdoing simply does not constitute a "pattern of racketeering" in any meaningful sense of that concept. The present interpretation to the contrary expands the application of RICO far beyond what the objectives of the Act justify. Subparagraph (3) of H.R. 2517 proposes to solve this problem by amending the definition of "pattern" to require that the two predicate acts be "separate in time and place." This provision should be adopted for the purposes of civil RICO.

b. The term "conduct or participate . . . in the conduct of [an] enterprise" found in 18 U.S.C. § 1962(c) should be defined to mean "to manage in a supervisory capacity the enterprise's basic functions so as to further the enterprise's financial interests." The need to add such a definition is demonstrated by such cases as United States v. Ladmer, 429 F. Supp. 1231 (E.D. N.Y. 1977). It is certainly tenable to condemn as a racketeering enterprise an organization that is perverted into an instrument of wrongdoing against outside individuals or other organizations. That appellation does not fit an accumulation of offenses by an organization's employees which do not infect the basic character of the enterprise. A pattern of such wrongdoing may identify an individual as a racketeer, but it is plainly insufficient to identify an organization as a racketeering enterprise. As the Ladmer court stated, 429 F.Supp. at 1244, RICO "is concerned with that which characterizes the conduct of the enterprise in question in its essential functions rather than irregularities committed in the course of the otherwise lawful conduct of an enterprise." See also United States v. Dennis, 458 F.Supp. 197 (E.D. Mo. 1978). Similarly, where officers or employees of an enterprise victimize their own enterprise by theft or similar misdeeds, they are not perverting or abusing the power of the enterprise -- the proper concern of RICO -- but merely taking advantage of the enterprise. The enterprise is the victim. In the same vein, an enterprise can not be perverted from the bottom. The language suggested above thus speaks of "manag[ing] in a supervisory capacity" to further ensure that the reach of the Act is limited to those persons whose conduct accurately may be said to "characterize" the essential nature of the enterprise.

* * *

In Sedima, though they disagreed on questions of statutory interpretation, all nine justices agreed that, in the words of the Court majority, "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors," 105 S. Ct. at 3302, in the words of Justice Powell, in dissent, that "RICO has been interpreted so broadly that it has been used more often against respected businesses with no ties to organized crime, than against the mobsters who were the clearly intended target of the statute," id. at 3289, and in the words of Justice Marshall, that the statute is now "being used for extortive purposes, giving rise to the very evils that it was designed to combat," id. at 3295. Each of the suggested amendments to the civil RICO provisions set out above would, without impairing the Act's salutary anti-racketeering purposes, focus RICO on its intended target while eliminating its potential for misuse by the parties to ordinary commercial and labor disputes who seek to gain an unfair advantage by bringing civil RICO actions.

Sincerely,

Laurence Gold
General Counsel

LG/11

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The Honorable Dennis DeConcini
United States Senate
Washington, D.C. 20510

Dear Senator DeConcini:

The purpose of this letter is to respond to a two-part written question posed by Senator DeConcini and to three written questions posed by Senator Thurmond. In each instance, for the Committee's convenience, I begin by reproducing the question and then stating my answer.

I. Questions by Senator DeConcini

a. Mr. Dubester, one of the consistent claims by opponents to civil RICO reform is that inappropriate civil RICO suits will be dismissed by the courts on a threshold motion to dismiss. Is that the experience of the members of labor when they are defendants in civil RICO actions?

In our experience, the courts are reluctant to dismiss inappropriate RICO actions. In large measure this reflects the RICO statute's breadth and vagueness. Because there is great uncertainty as to what conduct may be actionable under RICO, courts are hesitant to conclude that even apparently inappropriate RICO cases should be resolved short of trial.

b. Do cases like the Eastern case chill efforts to bargain collectively in an effective manner with management? Could you explain why it does, if it does?

Cases like the Eastern suit interfere with collective bargaining by contributing to an atmosphere of ill will that makes it very difficult for labor and management to engage in the good-faith give and take needed in order for effective bargaining to occur. Unlike other sorts of civil suits that may be viewed by the parties as "business as usual," a RICO suit involves allegations that the defendant has engaged in "racketeering activity". In addition, RICO provides management with a weapon that tends to inhibit concerted union action protected by federal labor laws. Once again, because of RICO's breath and vagueness -- and because the conduct at issue consists of economic pressure tactics that the law has traditionally viewed with hostility -- a union places itself at risk of very expensive, and very threatening, civil litigation by engaging in legitimate strike boycott and picketing activities. Thus, RICO in its present form fundamentally alters the environment in which negotiations take place. In simple terms, RICO actions interfere with the carefully crafted body of labor law that is designed to foster industrial self-government through good-faith collective bargaining with the right to strike at its core.

II. Questions by Senator Thurmond

1. Are any of you aware of national efforts to amend existing RICO laws in the individual states?

We are not in possession of such information.

2. Because of the potential high costs of defending a RICO action, do any of you support awarding attorneys' fees to a defendant who can show that he is the subject of a frivolous RICO claim?

Existing provisions of general application, such as Rule 11 of the Federal Rules of Civil Procedure and Rule 38 of the Federal Rules of Appellate Procedure, already allow the imposition of sanctions against a party who brings a frivolous suit. These provisions have not proven effective to deter the bringing of non-meritorious RICO actions, however, since the vagueness of the statute makes courts reluctant to find that a particular claim is frivolous. In our view, so long as the statute remains as broad and vague as it is, the hope that sanctions for frivolous litigation will limit RICO litigation has no reality to it.

3. Do you feel that under the current RICO statute, federal judges have enough flexibility to summarily dismiss RICO claims they feel are abusive of Congressional intent?

No. The breadth and vagueness of the RICO statute make it difficult for a judge to know in the early stages of litigation whether the conduct complained of is actionable. Judges therefore feel constrained not to dismiss RICO claims, even if the claims appear to have no merit, at least until there has been considerable development of the evidence. This tendency has been exacerbated by decisions such as that of the Supreme Court in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), which removed some of the discretion that courts had previously exercised to weed out cases that were clearly not within Congress' contemplation in enacting RICO. The Court's observation in Sedima that "RICO is evolving into something quite different from the original conception of its enactors" has thus become a self-fulfilling prophecy.

Very truly yours,

Ernest DuBester

Ernest DuBester
Legislative Representative

Senator DECONCINI. Mr. Feinberg, we are very pleased to have you here, an old hand not in years but in experience with the committee here, and we are pleased to have you as a witness.

STATEMENT OF KENNETH R. FEINBERG, COURT-APPOINTED SPECIAL RICO SETTLEMENT MASTER, WASHINGTON, DC

Mr. FEINBERG. Thank you, Mr. Chairman. I think I am unique on this panel, at least. I am not here representing any client or particular, specific interest. I am here, I think, because of my recent role as the court-appointed mediator in a private civil RICO action. The case demonstrated, I believe, a very important point that is often overlooked in this debate over the future of civil RICO; namely, the impact of the expansion of RICO litigation on traditional notions of federalism and States' interests.

In the case I was involved in, Mr. Chairman, *Suffolk County* v. *Long Island Lighting,* arising out of the Shoreham nuclear facility in Long Island in New York, I mediated that case at the request of the court, Judge Weinstein.

And that case involved an attempt to expand the reach of the civil RICO statute to review decisions of State ratemaking agencies. And I must point out that in that case there was no allegation at all that there was any wrongdoing or corruption or impropriety by the State agency.

This was a case which was, I think, an unbridled use of political power by Suffolk County in an effort to get that nuclear plant closed. This was not a case where there were allegations that the agency was corrupt or had done anything wrong whatsoever.

And it involved an attempt by Suffolk County to claim that the utility's employees had deliberately misled the ratemaking the agency, the Public Service Commission of New York.

Now, in that case, Mr. Chairman, the jury returned a verdict of guilty on the allegations of fraud committed by the defendant utility. Nevertheless, Judge Weinstein, one of our most respected judges in this country, notwithstanding the guilty verdict brought by this Federal jury, threw the case out after the verdict had come in, notwithstanding the verdict, on the ground that this was a terribly inappropriate use of the civil RICO statute.

What he said was three things. First, notwithstanding the verdict, after he had heard all this testimony over 2 months in the trial—notwithstanding the verdict, he said that using the civil RICO statute in a case like this one would undermine State regulatory and ratemaking authority and encroach on traditional State prerogatives involving the regulation of public utilities, at least in the absence, again, of any wrongdoing by the State.

Second, Federal juries simply do not have the expertise to review these ratemaking decisions that require a tremendous amount of actuarial and specialty and expertise, and therefore the jury verdict would be set aside.

And, finally, in the absence of a clear congressional intent, to somehow use the civil RICO statute to review legitimate State ratemaking activity, he determined that the plaintiffs had not stated a cause of action and he threw the case out.

I think that this case more than any other that I am aware of points out how the civil RICO statute can be abused, and in the absence of any allegation that the State is ill-equipped or unable to clean its own house, I recommend that your legislation that would limit the availability of treble damages is good, should be supported.

I also think, in my own experience, that we might take a look, this committee, at amending the statute even further to place a specific limitation on the ability of anybody to use the civil RICO statute as a vehicle to review State regulatory and ratemaking decisions.

I am in under the wire, Mr. Chairman.

Senator DeConcini. Mr. Feinberg, you remember the rules very well. I think you made a lot of them here.

You discuss your concerns about the intrusion of civil RICO in traditional State law regulatory matters with the case you cite, and that is a very good example.

Do you have concerns that civil RICO is also being used to move other State law disputes into Federal court?

Mr. Feinberg. Yes, I do, and I think that this is a point that you make, Mr. Chairman, that is often overlooked in terms of upsetting the balance on the civil RICO side. What I find in my experience—and this is just my experience, Mr. Chairman—it is often used as a political bludgeon, as a weapon to force inappropriate settlement, inappropriate negotiation, or even force a political solution, as in this case, on the parties where the State is a perfectly appropriate forum to address the merits of the allegation.

Finally, as you pointed out in your last question to Mr. Dubester, here is a case where—it isn't as if Judge Weinstein threw the case out pretrial. He let all the evidence come in over 2 months to find out just what is the nub of this allegation under the civil RICO statute.

And then he did something, I think, that if you know Judge Weinstein, you are not surprised, but it is a rather courageous step for a judge to take—in a highly visible case like Shoreham and nuclear power, he said notwithstanding the jury's verdict of guilty, I just don't think that this is the forum to resolve this; go to the State courts, go to the State agencies, demonstrate the fraud, and let them rectify the balance. And I think it is a critically important case in support of your legislation, to justify your legislation.

Senator DeConcini. Is that decision on appeal now?

Mr. Feinberg. It is on appeal now and we will see what happens with that appeal, although I think Professor Blakey thinks it will be affirmed. [Laughter.]

[The prepared statement of Mr. Feinberg and response to questions follow:]

TESTIMONY OF
KENNETH R. FEINBERG
BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
JUNE 7, 1989

Mr. Chairman and members of the Committee, thank you for the invitation to appear today to discuss proposed amendments to the Racketeer Influenced and Corrupt Organizations Act (RICO). It is always a pleasure for me to return to this Committee, and I am especially pleased to address the proposed modifications of the RICO statute.

I would like to use this opportunity to discuss with the Committee my own recent experience as a court-appointed mediator in a civil RICO case, County of Suffolk, et al. v. Long Island Lighting Co., et al. ("Suffolk v. LILCO") 87 CV 646 (JBW) ___ F.Supp. ___ (E.D.N.Y.). This case demonstrated some of the excesses found in the current application and interpretation of the RICO statute. It constitutes a perfect example of why reform of civil RICO should be a top priority of the Congress.

In Suffolk v. LILCO, involving the highly emotional issue of nuclear power, the plaintiffs sought to use the civil RICO statute to review and reverse a

SERIES OF REGULATORY DECISIONS MADE BY NEW YORK STATE'S PUBLIC SERVICE COMMISSION. FORTUNATELY, THE PRESIDING JUDGE IN THE CASE WAS ONE OF THE NATION'S MOST RESPECTED JURISTS, JACK B. WEINSTEIN, WHO ISSUED AN OPINION OF NATIONAL IMPORTANCE SEVERELY CURTAILING THE PROPOSED EXPANSIVE APPLICATION OF RICO. NEVERTHELESS, ALTHOUGH JUDGE WEINSTEIN PLACED APPROPRIATE AND REASONABLE LIMITS ON FEDERAL CIVIL RICO, HE DID SO IN JUST THE ONE CASE PENDING BEFORE HIM; AS THE COMMITTEE WELL KNOWS, JUDGE WEINSTEIN'S OPINION IS NOT BINDING ON OTHER FEDERAL JUDGES AND IS NOW BEING APPEALED. ACCORDINGLY, IT IS IMPORTANT THAT CONGRESS ACT TO ADOPT IMPORTANT LIMITATIONS AND RESTRICTIONS ON THE JURISDICTIONAL BREADTH AND APPLICABILITY OF THE CIVIL RICO STATUTE. THIS FEDERAL LAW MUST NOT BE USED, AS WAS ATTEMPTED IN SUFFOLK V. LILCO, TO ENCROACH UPON TRADITIONAL STATE ENFORCEMENT PREROGATIVES AND UPSET HISTORICAL NOTIONS OF FEDERALISM.

MR. CHAIRMAN, PERMIT ME TO DESCRIBE THE RICO LITIGATION THAT WAS PENDING BEFORE JUDGE WEINSTEIN, MY ROLE IN THE CASE, AND THE COURT'S ULTIMATE RESOLUTION OF THE MATTER.

THE CASE AROSE OUT OF THE PUBLIC CONTROVERSY SURROUNDING THE FUTURE OF THE SHOREHAM NUCLEAR POWER PLANT, WHICH IS LOCATED ON LONG ISLAND. IN THE 1970'S, THE CONSTRUCTION OF THE SHOREHAM PLANT ENJOYED WIDE PUBLIC SUPPORT; IT WAS SEEN AS AN ANSWER TO HIGH ENERGY costs, growing energy needs and risky dependence on foreign oil. But, as a result of the incidents at Three Mile Island, Chernobyl and elsewhere, public support for Shoreham wavered, and ultimately shifted. By the mid-1980's, it became clear that an overwhelming majority of the residents of Long Island opposed the completion of the Shoreham plant. Meanwhile, as a result of some fifteen years of construction, the cost of building the plant had increased exponentially. Original plans called for a cost of approximately $1 billion. Actual costs exceeded $5 billion. Opposition to the Plant, and these large cost overruns, made Shoreham's Owner, Long Island Lighting Company (LILCO), a favorite target of Long Island's citizens and elected officials alike.

Opponents of Shoreham used every available legal and political avenue to block the opening of the plant. They took their fight to the federal Nuclear Regulatory Commission, and various state regulatory agencies, including the Public Service Commission and the Consumer Protection Board. In addition, the future of the plant became fair game in the political arena. The Suffolk County legislature, which came to be the leading opponent of the Shoreham plant, filed various lawsuits seeking to block the opening of Shoreham. One of those lawsuits was a civil RICO class action against LILCO filed in 1987 in federal court in the Eastern District of New York. Claims against LILCO under this RICO

SUITE, IF PROVEN, WOULD HAVE RESULTED IN A LIABILITY OF NEARLY $10 BILLION -- MORE THAN ENOUGH TO BANKRUPT LILCO AND INSURE THAT SHOREHAM NEVER OPENED.

SUFFOLK COUNTY'S RICO COMPLAINT ALLEGED THAT VARIOUS LILCO EMPLOYEES HAD DELIBERATELY MISLED THE STATE PUBLIC SERVICE COMMISSION (THE RATEMAKING AGENCY WITH JURISDICTION OVER UTILITIES IN NEW YORK) IN RATEMAKING PROCEEDINGS. THE ALLEGEDLY FRAUDULENT STATEMENTS RELATED TO PROGRESS IN COMPLETING THE SHOREHAM PLANT, THE COSTS OF COMPLETION AND THE NECESSARY ENERGY RATES TO BE CHARGED CUSTOMERS. PLAINTIFFS CLAIMED THAT THESE FRAUDULENT STATEMENTS RESULTED IN LILCO OBTAINING UNWARRANTEDLY HIGH ELECTRIC UTILITY RATES. IT IS FAIR TO SAY, I THINK, THAT A PRIMARY MOTIVATION OF SUFFOLK COUNTY IN INSTITUTING THIS CIVIL RICO SUIT WAS TO USE THE RICO STATUTE FOR THE COUNTY'S OWN POLITICAL ENDS -- NAMELY AS A BLUDGEON AGAINST LILCO IN THE COUNTY'S EFFORTS TO BLOCK THE OPENING OF SHOREHAM.

IN THE FALL OF 1988, THE COURT CONDUCTED A TWO-MONTH JURY TRIAL OF ONLY SUFFOLK COUNTY'S RICO CLAIMS -- THE CLAIMS OF THE OTHER ONE MILLION RATEPAYERS WERE SEVERED FOR LATER CONSIDERATION. ULTIMATELY, THE JURY FOUND THAT LILCO HAD MADE FALSE AND MISLEADING STATEMENTS TO THE PUBLIC SERVICE COMMISSION AND THAT THOSE STATEMENTS HAD RESULTED IN HIGHER UTILITY RATES BEING IMPOSED ON CUSTOMERS ON LONG ISLAND. THE JURY awarded Suffolk County damages of over $7.5 million, which were trebled under the RICO statute and totalled nearly $23 million. These damages, of course, applied only to Suffolk County as an individual ratepayer. However, the class of past and present utility ratepayers of Long Island whose claims had been severed was waiting in the wings. Rough calculations indicated that if the Court certified this class of ratepayers, they could use the jury's findings of fault and the federal RICO statute to obtain RICO damages against LILCO of as much as $4 billion -- enough to bankrupt the company.

It was at this point that Judge Weinstein asked me to attempt to mediate a settlement of the entire dispute. During the mediation process, the court issued an opinion dismissing the plaintiffs' RICO claims. As a result, we were able to reach a settlement between representatives of the class and LILCO, thus achieving rate relief for residents of Long Island and assuring LILCO's continued financial viability. Immediately thereafter, Governor Cuomo negotiated an agreement with LILCO that established a blueprint and schedule for the ultimate closing of Shoreham. Suffolk County opted not to participate in the settlement or the Governor's arrangement with LILCO, and it is currently planning to appeal the Court's judgment dismissing the RICO allegations.

Mr. Chairman, I believe that Judge Weinstein's decision identifies, articulates, and imposes reasonable limits on the application of the federal civil RICO statute. The opinion recognizes that concepts of federalism and comity between federal and state governments should act as restrictions on the largely unlimited expansion of RICO into the domain of state and local government. (I have attached to my testimony and submit for the record a copy of Judge Weinstein's opinion.)

More than anything else, the court was convinced by the evidence at the trial that it would be inappropriate to use RICO to challenge state ratemaking proceedings. As Judge Weinstein wrote, "Whatever doubt the court entertained before trial about the need to defer rate-related matters to the Public Service Commission was put to rest by the evidence both sides had to present to the jury." After hearing weeks upon weeks of highly technical testimony about state utility ratemaking, the Court wisely concluded that the purpose of plaintiffs' RICO action was to ask a federal jury to reset state electric utility rates -- in effect to sit in the place of the New York State Public Service Commission.

Judge Weinstein's opinion in Suffolk v. LILCO details the interrelated problems associated with allowing a federal jury to review the decisions of a state ratemaking agency. The state agency makes its

DETERMINATIONS IN ACCORDANCE WITH AN ELABORATE PUBLIC PROCEDURE ESTABLISHED BY STATE LAW. THE AGENCY RELIES ON AN EXPERT STAFF AS WELL AS ITS OWN EXPERIENCE IN SETTING UTILITY RATES. AS THE COURT POINTED OUT, BECAUSE OF THE TECHNICAL NATURE OF RATEMAKING, FEDERAL COURTS HAVE HISTORICALLY SHOWN GREAT DEFERENCE TO STATE RATEMAKING AGENCIES. THIS DEFERENCE HAS FOUND EXPRESSION IN VARIOUS WELL-ESTABLISHED LEGAL PRINCIPLES SUCH AS THE DOCTRINE OF "PRIMARY JURISDICTION," "ABSTENTION" AND THE CONCEPT OF "OUR FEDERALISM" AS ARTICULATED IN SUCH SUPREME COURT CASES AS YOUNGER V. HARRIS, 401 U.S. 37 (1971). ALLOWING THE USE OF THE FEDERAL CIVIL RICO STATUTE TO REVIEW THE PROCEDURES OF STATE AGENCIES AND CHALLENGE THEIR DECISIONS WOULD UNDERMINE, AND COULD EVEN DESTROY, STATE REGULATORY SCHEMES. THIS IS PARTICULARLY TRUE UNDER THE CIVIL RICO STATUTE, BECAUSE THE POSSIBILITY OF TREBLE DAMAGES LURES MANY DISSATISFIED PARTIES INTO FEDERAL COURT, REGARDLESS OF THE AVAILABILITY OF MORE APPROPRIATE STATE FORUMS. EXPANSION OF FEDERAL JURISDICTION THROUGH PRIVATE PARTY CIVIL RICO ACTIONS THREATENS LONGSTANDING LEGAL PRINCIPLES AND THE UNDERLYING COMITY BETWEEN STATE AND FEDERAL GOVERNMENTS.

GIVEN THIS POTENTIAL FOR LEGAL MAYHEM IN THE FORM OF FEDERAL INCURSION INTO STATE REGULATORY ACTIVITIES, JUDGE WEINSTEIN CAREFULLY EXAMINED THE RICO STATUTE AND ITS LEGISLATIVE HISTORY FOR CLEAR EVIDENCE OF CONGRESS'

INTENT TO ALTER THE STATE-FEDERAL BALANCE. AFTER REVIEWING THE LANGUAGE OF THE STATUTE AND THE LIMITED LEGISLATIVE HISTORY OF ITS CIVIL REMEDY PROVISION, THE COURT CONCLUDED THAT THERE WAS NO EVIDENCE THAT CONGRESS INTENDED THAT THE RICO STATUTE SHOULD HAVE SUCH A DRAMATIC EFFECT ON TRADITIONAL NOTIONS OF FEDERALISM. IN THE ABSENCE OF A CLEAR EXPRESSION OF CONGRESSIONAL INTENT, JUDGE WEINSTEIN CONCLUDED THAT CONGRESS NEVER INTENDED, AND THE FEDERAL COURTS SHOULD NOT ALLOW, THE RICO STATUTE TO WORK A DE FACTO PREEMPTION OF POWERS THAT RIGHTFULLY BELONG TO THE STATES. DRAWING ON THE CONSTITUTIONALLY-BASED BALANCE OF POWERS BETWEEN THE STATE AND FEDERAL GOVERNMENTS, THE COURT DETERMINED THAT PLAINTIFFS' ALLEGATIONS AGAINST LILCO DID NOT STATE A CAUSE OF ACTION UNDER CIVIL RICO. MR. CHAIRMAN, MY FIRST-HAND EXPERIENCE WITH THIS EXTRAORDINARY STATUTE CONVINCES ME THAT CHANGES IN THE CIVIL RICO LAW ARE NECESSARY. RICO CLAIMS ARE NOW SO FAR-REACHING AS TO UNDERCUT THE BASIC BALANCE BETWEEN STATE AND FEDERAL JURISDICTION. JUDGE WEINSTEIN'S DECISION PREVENTED SUCH EXPANSION IN THIS ONE CASE. HOWEVER, CONGRESS SHOULD NOW ACT AND ADOPT AMENDMENTS THAT RESTRICT THE APPLICABILITY OF THE CIVIL RICO STATUTE.

MR. CHAIRMAN, THE RICO REFORM LEGISLATION INTRODUCED IN THIS CONGRESS, S.438 AND H.R.1046, PROPOSES SIGNIFICANT IMPROVEMENTS IN THE APPLICATION OF CIVIL RICO. THE CHANGES IN THE AVAILABILITY OF TREBLE

DAMAGES WILL GO FAR IN PROTECTING THE ALL-IMPORTANT BALANCE BETWEEN STATE AND FEDERAL POWERS BY MAKING CIVIL RICO LESS INVITING IN GARDEN VARIETY COMMERCIAL DISPUTES. IN ADDITION TO THESE CHANGES, I WOULD SUGGEST THAT WITHOUT THREATENING THE POSITIVE AND USEFUL ELEMENTS OF THE RICO STATUTE, THE COMMITTEE MIGHT ALSO CONSIDER LANGUAGE THAT WOULD PREVENT THE USE OF CIVIL RICO AS A VEHICLE FOR CHALLENGING THE DECISIONS OF STATE REGULATORY AND RATEMAKING AGENCIES. THE LANGUAGE I AM SUGGESTING WOULD PROVIDE IMPORTANT PROTECTIONS FOR THE HISTORICAL NOTION OF FEDERALISM.

AS MEMBERS OF THIS COMMITTEE KNOW, OVER THE PAST TWO DECADES THERE HAS BEEN A MAJOR DEBATE CONCERNING THE SCOPE OF THE CIVIL RICO LAW. A LEGISLATIVE RECORD HAS BEEN DEVELOPED OVER THE PAST FEW YEARS WHICH I BELIEVE DEMONSTRATES THE NEED FOR AMENDMENT OF THE STATUTE. THE BILL BEFORE THIS COMMITTEE IS AN APPROPRIATE VEHICLE FOR ACCOMPLISHING THIS IMPORTANT GOAL.

I AGAIN THANK THE COMMITTEE FOR THE OPPORTUNITY TO APPEAR HERE TODAY, AND WILL BE PLEASED TO ANSWER ANY QUESTIONS.

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
★ APR 14 1989 ★
TIME A.M. ____________
P.M. ____________

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
------------------------------------X

COUNTY OF SUFFOLK, a municipal
corporation, ROBERT ALCORN,
CHRISTOPHER S. GEORGE, FRED HARRISON,
PETER MANISCALCO, WILLIAM P. QUINN,
and CUSTOM EXTRUDERS, INC.,

Plaintiffs,

- against -

LONG ISLAND LIGHTING COMPANY,
STONE & WEBSTER ENGINEERING COMPANY,
CHARLES R. PIERCE, WILFRED O. UHL,
CHARLES J. DAVIS, and
ANDREW W. WOFFORD,

Defendants.
------------------------------------X

AMENDED

MEMORANDUM AND ORDER

APPLICATION OF RICO

87-CV-646 (JBW)

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WEINSTEIN, J:

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I. PROCEDURAL BACKGROUND

Suffolk County alleges that the Long Island Lighting Company (LILCO) and its former managers have repeatedly lied to the New York Public Service Commission (PSC) in order to obtain the higher electric rates needed to build the Shoreham Nuclear Power Facility (Shoreham). It brings this suit under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 et seq.

The uncertainties raised by this litigation have compounded the serious economic and energy problems facing millions of people in New York City, Nassau and Suffolk Counties. The welfare of Long Island residents is threatened by doubts about LILCO's continued capacity to supply necessary electric power at affordable rates.

Suffolk, with five individuals and one business corporation, originally brought this suit as a class action on behalf of itself and a class of over one million present and former LILCO ratepayers. Because of Suffolk's longstanding opposition to the opening of Shoreham and its entanglement with LILCO in various other pending litigations, Suffolk and its attorneys could not adequately represent the interests of the class. See ___ F.Supp ___ (E.D.N.Y. 1988) (September 6, 1989). Suffolk's claims were severed from those of the class for the purposes of the impending trial.

After a two month jury trial, Suffolk obtained a verdict in its favor on some of its RICO claims. It was awarded damages by the jury which, when trebled as is required under the RICO statute, totaled some 22.9 million dollars. Following the verdict, LILCO moved for trial of a previously severed equitable defense to Suffolk's claims. That defense is dismissed for the reasons described below in Part II.

LILCO has also moved for judgment notwithstanding the verdict or in the alternative a new trial. The motion for judgment notwithstanding the verdict is granted, and the new trial motion is conditionally denied, for the reasons stated below in Part III.

II. EQUITABLE DEFENSE AND FIRST AMENDMENT

LILCO claims that Suffolk's unremitting opposition to the opening of Shoreham has caused far more damage to LILCO than the jury found Suffolk had suffered because of LILCO's alleged fraud on the PSC. This equitable defense is triable without a jury. The court has now heard the witnesses and received documents bearing on this issue. It makes the following findings:

After many years of encouraging LILCO to build Shoreham to reduce Long Island's total dependence on foreign oil for its power and to take advantage of lower costs for nuclear fuel, Suffolk reversed its policy. Beginning in the early 1980's it became an implacable foe of Shoreham. At the local, state and national levels it has successfully fought to prevent Shoreham from producing the 800 megawatts the plant has been capable of generating. In addition to advocacy before the state legislature and state and federal administrative bodies, Suffolk's refusal to cooperate in providing emergency procedures for dealing with a possible nuclear accident has blocked LILCO from using Shoreham.

Suffolk's opposition to Shoreham was based on a bona fide concern for, and by, its residents over the safety of the plant. Similar good faith misgivings over the hazards of nuclear power on Long Island have motivated the Governor and various state departments and legislators to seek Shoreham's closing.

The evidence demonstrated that, had Suffolk and the state cooperated with LILCO, Shoreham would now be in operation and LILCO and its shareholders (and possibly its ratepayers) would be in a more favorable economic position. The cost to LILCO and others of Suffolk's and the state's change of views regarding Shoreham cannot be precisely measured. It can reasonably be estimated as at least in the hundreds of millions of dollars.

Nevertheless, the equitable defense must be dismissed. Suffolk had, and has, a constitutional right under the First Amendment to speak and act in opposition to Shoreham. Its view that Shoreham represents a danger to Suffolk residents may be expressed in exercising its power to petition any agency of government including the legislature, administrative agencies and the courts. It can, if it wishes, enact its own local legislation and exercise its own police powers when expressing its policy so long as its action is in conformity with state and federal limitations. No proof of a violation of any state or federal limits on Suffolk's power has been shown.

A municipal corporation, like any corporation, is protected under the First Amendment in the same manner as an individual. *See* *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-84 (1978). The right to petition administrative agencies is a basic First Amendment right. *See*, *e.g.*, *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977).

It follows that plaintiff's activities before the United States Nuclear Regulatory Commission (NRC) are privileged against claims by defendants that Suffolk improperly delayed the Shoreham licensing proceedings. See, e.g., Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 615 (8th Cir. 1980). The Noerr-Pennington doctrine, protecting the right of a party to oppose its adversaries before administrative agencies, is applicable. See, e.g., Southern Pac. Communications Co. v. American Tel. and Tel. Co., 556 F.Supp. 825, 881 (D.D.C. 1982), aff'd, 740 F.2d 980 (D.C.Cir. 1984), cert. denied, 470 U.S. 1005 (1985). No damages may be recovered that arise from Suffolk's exercise of its constitutional right to oppose Shoreham's operation.

Suffolk's right has already been recognized in related litigation involving Shoreham. In 1984 LILCO was granted leave to intervene as a plaintiff in a federal suit filed by a not-for-profit corporation, and five of its members, against Suffolk. Citizens For An Orderly Energy Policy, Inc. v. County of Suffolk, 604 F.Supp. 1084, 1087-88 (E.D.N.Y. 1985), aff'd, 813 F.2d 570 (2d Cir. 1987). LILCO alleged that Suffolk's lack of participation in emergency evacuation planning "may result in a denial of an operating license for Shoreham and spell financial doom and bankruptcy for the company." 604 F.Supp. at 1087. The district court dismissed LILCO's claim for damages, noting that

> the NRC alone has the power to decide whether the license will be granted. [Suffolk's] actions in seeking to influence the NRC's decision are not in and of themselves an unlawful interference with the licensing process.

Id., 604 F.Supp. at 1096. The Second Circuit affirmed. 813 F.2d 570 (2d Cir. 1987).

LILCO may possibly have a claim for breach of contract against Suffolk because of the latter's alleged failure to comply with an agreement to cooperate in evacuation procedures. That issue is being litigated in a pending state case. All pendent and related state claims were dismissed in this RICO action.

Suffolk's motion to dismiss LILCO's equitable defense is granted.

III. SUFFOLK COUNTY'S CLAIMS

A. Motions for Judgement Notwithstanding the Verdict and a New Trial

LILCO has moved to dismiss the complaint notwithstanding the verdict of the jury. It moves in the alternative for a new trial. Various factual and legal grounds are advanced by LILCO in support of its motions.

1. Sufficiency of the Evidence

LILCO challenges a number of the jury's factual determinations. It claims no reasonable jury could have concluded that defendants had the requisite intent to defraud. It argues that defendants' alleged misrepresentations could not have caused any injury to Suffolk because the PSC did not rely on the alleged misrepresentations in deciding to grant rate increases, there was no evidence that the rates paid by Suffolk would have been lower absent the alleged fraud, and the ratemaking techniques employed by the PSC, even if influenced by the defendants' alleged fraud, will ultimately provide an aggregate benefit to ratepayers, including Suffolk. LILCO also asserts that the evidence shows the County's claim with regard to the 1977-78 rate case was barred by the statute of limitations and that the evidence failed to establish the elements of a RICO claim.

Deference to the jury's conclusions is required by the Seventh Amendment to the Constitution, guaranteeing the right to a jury trial. Here the jury apparently followed the court's instructions. The jury's verdict was supportable on its view of the facts and the credibility of the witnesses.

In many respects the court does not disagree with the jury's determinations. There was sufficient evidence to support the conclusion that defendants' alleged misrepresentations have injured Suffolk. The jury was not unreasonable in deciding that Suffolk neither knew nor should have known of the defendants' alleged fraud in the 1977-78 rate case prior to the four year limitations period that governs RICO claims. *See* *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143 (1987); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988). Nor can it be said the evidence failed to establish the elements of a RICO claim. In this regard it should be noted that, with the hindsight provided by the Second Circuit's recent *en banc* decisions in *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989), and *Beauford v. Helmsley*, 865 F.2d 1386 (2d Cir. 1989), decided after the verdict here, this court's charge to the jury concerning the elements of a RICO violation were, if anything, overly favorable to LILCO.

The court does not agree with the jury's conclusion that the defendants intended to commit fraud. The court's conclusion is that LILCO's estimates of the time needed to complete Shoreham were made in good faith, but based on misplaced optimism, lack of nuclear experience and events beyond its control. After the plant was begun, Three Mile Island and other nuclear events caused the NRC to substantially increase the safety requirements for nuclear plants. These stringent new protections required huge new expenditures of money and time. The breakdown of Shoreham's emergency diesel generators and other impediments to operation seem less the result of fraud than of incompetence and inexperience on the part of LILCO and its subcontractors. LILCO appears to the court to have made managerial judgments which, in retrospect, were unsound, but no fraud seems to have been intended.

Nonetheless, while the evidence of fraud by LILCO and those associated with it seemed to the court to be insubstantial and unconvincing, this is an insufficient basis on which to set aside the verdict and grant judgment for defendants pursuant to Rule 50(b). The jury was entitled to its own view, and LILCO bears a heavy burden in its motion for judgment notwithstanding the verdict. The motion for judgment NOV may be granted "only if the evidence, viewed in the light most favorable to [Suffolk] without considering credibility or weight, reasonably permits only a conclusion in [LILCO's] favor." Sirota v. Solitron Devices, Inc., 673 F.2d 566, 573 (2d Cir.), cert. denied, 459 U.S. 838 (1982) (citing cases).

Here that burden has not been met. Despite the court's view of the evidence, it cannot be said that the jury was unreasonable in taking a contrary view. Thus the motion to set aside the verdict for a failure of proof must be denied.

Although the standard for granting a new trial for a failure of proof is less stringent than that for judgment NOV under Rule 50 of the Federal Rules of Civil Procedure, "[i]t is well settled that a trial judge's disagreement with the jury's verdict is not sufficient reason to grant a new trial." Mallis v. Bankers Trust Co., 717 F.2d 683, 691 (2d Cir. 1983) (citing cases). Even when the trial judge has "characteriz[ed] the evidence against [the prevailing party] as 'overwhelming'" and the evidence in favor as "'extremely thin and tenuous,'" there is no requirement that a new trial be granted. Compton v. Luckenbach Overseas Corp., 425 F.2d 1130, 1133 (2d Cir.), cert. denied, 400 U.S. 916 (1970). Rather, a new trial is warranted only when "it is quite clear that the jury has reached a seriously erroneous result" or for other reasons there has been a "miscarriage of justice." Bevevino v. Saydjari, 574 F.2d 676, 684 (2d Cir. 1978). While the court does not share the jury's view that fraud was intended, it cannot be said the jury's determination is "seriously erroneous" or there has been a "miscarriage of justice." Thus LILCO's motion for a new trial pursuant to Rule 59 of the Federal Rules of Civil

Procedure on the grounds of a failure of proof must be denied as well.

The same considerations as warrant denial of a new trial lead the court to deny a conditional retrial pursuant to Rule 50(c)(1) of the Federal Rules of Civil Procedure. As indicated below in Part III B., a motion for judgment notwithstanding the verdict is being granted pursuant to Rule 50(b) of the Federal Rules of Civil Procedure since the case is being dismissed. In general, new trials after appeal should be avoided where there has been no miscarriage of justice. See 9 C. Wright, A. Miller & E. Kane, Federal Practice & Procedure: Civil §2539, n. 75 (1971).

2. Res Judicata

LILCO also argues that the verdict should be set aside because the doctrine of res judicata bars Suffolk's RICO claims in this case. There are two prior actions upon which LILCO relies. The first is the Shoreham Prudence Proceeding, which was conducted by the PSC from 1979 to 1985 to determine whether the costs of building Shoreham were prudently incurred. Suffolk was an intervenor against LILCO in that proceeding. The second is a suit brought against LILCO by Suffolk in state court in 1982 challenging various aspects of the Shoreham construction. The suit was removed to federal court and subsequently the County's claims were dismissed on jurisdictional grounds. County of Suffolk v. Long Island Lighting Co., 554 F.Supp. 399 (E.D.N.Y. 1983), aff'd, 728 F.2d 52 (2d Cir. 1984). LILCO contends that Suffolk's RICO claims are barred by res judicata because they arise out of the same transaction or series of transactions that were the subject of these prior proceedings, relying upon O'Brien v. City of Syracuse, 54 N.Y.2d 353, 445 N.Y.S.2d 687, 429 N.E.2d 1158 (1981).

LILCO's argument is not persuasive. O'Brien is not applicable. Res judicata does not apply if the prior adjudicatory body lacked subject matter jurisdiction over the claims asserted in the later action. See Cullen v. Margiotta, 811 F.2d 698 (2d Cir.), aff'd sub nom. Nassau County Republican Comm. v. Cullen, 107 S.Ct. 3266 (1987) (citing cases and authorities, and holding that prior state proceeding was no bar to later assertion of RICO claim in federal court). Although it has recently been held that New York courts may entertain RICO claims, Simpson Elec. Corp. v. Leucadia, Inc., 72 N.Y.2d 450, 534 N.Y.S.2d 152, 530 N.E.2d 860 (1988), the PSC has no jurisdiction to try a RICO claim as such, although it may consider the fraud of a public utility in setting rates. See N.Y. Public Service Law §§ 5, 22, 66(5) and (12), 71, and 72 (prescribing powers of PSC); City of New York v. New York Pub. Serv. Comm'n, 53 A.D.2d 164, 385 N.Y.S.2d 634, 635 (3d Dep't 1976), aff'd, 42 N.Y.2d 916, 397 N.Y.S.2d 1005 (1977) (PSC has only those powers conferred to it by statute); authorities cited infra at section III B. No findings with respect to fraud were made in the Shoreham Prudence Proceedings. They cannot act as a bar to Suffolk's claims in this litigation. Moreover, the jury concluded that LILCO committed fraud in a Shoreham Prudence Proceeding itself. Res judicata does not apply to judgments obtained by fraud. Commissioner of Internal Revenue Service v. Sunnen, 333 U.S. 591, 597 (1948); McCarty v. First of Georgia Ins., 713 F.2d 609, 612-13 (10th Cir. 1983); see also Restatement (2d) of Judgments §26 comment j (1982).

As for the prior action in federal court, Suffolk's various state common law claims, upon which that action was based, were dismissed on procedural grounds rather than on the merits on January 14, 1983. Here the jury determined that Suffolk neither knew nor should have known of LILCO's alleged frauds prior to March 3, 1983. Moreover, the jury concluded that LILCO had committed fraud during the 1983-84 rate case and again in the Shoreham Prudence Proceeding in 1984. These frauds, if they existed at all, formed part of the "pattern of racketeering activity" found by the jury, see 18 U.S.C. §1961(5), but occurred after Suffolk's earlier suit against LILCO had been dismissed. In such circumstances it cannot be argued that because of Suffolk's failure to bring a RICO claim against LILCO in the 1982 action, res judicata operates to bar the assertion of a RICO claim in this action. Cf. Lawlor v. National Screen Service Corp., 349 U.S. 322, 326-28 (1955) (although plaintiff's antitrust claims in an earlier suit were dismissed, res judicata did not bar later antitrust action "based on essentially the same course of wrongful conduct" where new violations were alleged).

3. Primary Jurisdiction

Finally LILCO argues that Suffolk's RICO claims should be stayed or dismissed pursuant to the doctrine of primary jurisdiction. Under this doctrine, issues within the special expertise of an administrative agency should be decided by the agency rather than a court. The doctrine is discussed at length in the following section of this memorandum. In light of the conclusion that RICO does not apply to this case, the court need not decide whether the primary jurisdiction doctrine, by itself, is a sufficient basis for a stay or dismissal of this action.

For the foregoing reasons, LILCO's motions for a new trial are denied.

B. Application of RICO

This does not end the matter. After trial the defendant may move for what amounts to delayed summary judgment in the form of a motion for judgment notwithstanding the verdict. Rule 50, Federal Rules of Civil Procedure; DeRosa v. Remington Arms Co., 509 F.Supp. 762 (E.D.N.Y. 1981).

Prior to the trial the court, based on RICO precedent, was of the view that the federal RICO statute took precedence over state rate-regulating policy. What the trial proved almost beyond peradventure was that RICO cannot, and should not, be applied in a case such as this to permit a federal jury in a civil case to second guess the ratemaking authority of the state. In effect, the jury was asked to retroactively reset the electric rates previously fixed by the PSC with its staff of hundreds of technicians working in such arcane fields as utility ratemaking, marketing of utility securities, taxation, economics, generating plant construction, and power grids. PSC decisions affect generating capacity needed to ensure a supply of power sufficient to meet peak demands and emergency breakdowns of equipment. The rates it sets affect not only the particular utilities before it but the welfare of the entire state's population because of interrelations between generators and financing resources all over the state, in surrounding states and in Canada.

The "major purpose" of the RICO statute was to help block the criminal predations of organized crime upon legitimate businesses. United States v. Turkette, 452 U.S. 576, 591 (1981). With almost no legislative debate or comment, it was extended as an afterthought to civil cases to encourage private suits as a supplement to the efforts of federal law enforcement agencies. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 507, 516-20 (1985)(Marshall, J., dissenting) (describing legislative history of RICO's civil remedy provision, 18 U.S.C. § 1964(c)). See also D. Smith and T. Reed, Civil Rico, ¶1.01 (1987). The great breadth of its predicate offenses, principally mail and wire fraud, has permitted the statute in its civil aspects to be broadly construed to cover a wide variety of fraudulent schemes. Sedima, 473 U.S. at 500. See, e.g., Beauford v. Helmsley, 865 F.2d 1386 (2d Cir. 1989) (applying RICO to alleged fraudulent condominium apartment conversion scheme); Haroco v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384 (7th Cir. 1984), aff'd, 473 U.S. 606 (1985) (RICO claim stated where bank alleged to have charged interest rates in excess of loan agreement). As a result, the Supreme Court has recognized that RICO is "evolving into something quite different from the original conception of its enactors." Sedima, 473 U.S. at 500.

That Congress has the power under the Necessary and Proper, the Supremacy and the Interstate Commerce clauses of the Constitution to impinge on states' powers to regulate utilities is assumed. And that Congress was aware of fears the RICO statute might alter the federal-state balance in some respects is apparent. United States v. Turkette, 452 U.S. 576, 586-87 (1981). Nevertheless, no case, no language of the statute and no congressional finding has demonstrated that Congress and the President intended to overturn all federal doctrine and jurisprudence in federalizing the law of torts under RICO. Sedima, 473 U.S. at 507 (Marshall, J., dissenting). As Professors Hart and Wechsler have observed,

> [f]ederal legislation, on the whole, has been conceived and drafted on an ad hoc basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the

> special purpose. Congress acts, in short, against the background of the total corpus juris of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.

Hart and Wechsler's The Federal Courts and the Federal System 470-71 (P. Bator, P. Mishkin, D. Shapiro, H. Wechsler eds., 2d ed. 1973). Cf. Fort Wayne Books v. Indiana, 109 S.Ct. 916 (1989) (application of RICO limited by First Amendment to the Constitution).

That Congress intended to destroy a balance between state and national roles developed over more than two hundred years under the constitutional guarantee to the states of a Republican Form of Government and the Ninth, Tenth and Eleventh Amendments seems highly doubtful. The Constitution itself in section 4 of Article IV "guarantee[s] to every State in this Union a Republican Form of Government" -- and the word government implies the powers to govern independently, not merely as an appendage of Washington. The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, [to the national government], shall not be construed to deny or disparage others retained by the people [and their representatives in state government]." The Tenth Amendment notes that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." And the Eleventh Amendment limits the national courts' power -- and indirectly that of Congress -- to "extend" the "Judicial power of the United States . . . to any suit . . prosecuted against one of the United States" by enumerated plaintiffs.

The Constitution was adopted by sovereign nations first joined in a confederation and, after adoption, in a federal system of national and state sovereignties. Much of our early court "decisions can be seen as the replacement of the idea that the Constitution was created by a compact among the states with the idea that the Constitution created a union of the states." G. E. White, III & IV History of the Supreme Court of the United States, The Marshall Court and Cultural Change, 1815-35, 487 (1988). Despite exercise of increasing power by the national government no one who understands state government and our federal political system can doubt that the states are still powerful sovereignties respected as such by all three branches of the national government. This knowledge permeates the very bones of our political system. Congress need not explicitly recognize this given in each law it passes, for all its work is pregnant with that understanding. In construing legislation the courts can assume not only that those in Congress breathed when they voted, but that they were aware of the constitutional atmosphere in which their votes were cast.

With this fundamental assumption of our governmental structure in mind we turn to the relationship between federal and state power in the field of state regulation of utilities. That relationship is reflected in such diverse doctrines as those of primary jurisdiction, recognizing that state regulatory agencies should decide electric rates; of abstention to avoid upsetting complex regulatory schemes; and of limits on federal court powers to compel state officials and bodies to have their decisions judged in federal courts.

1. Primary Jurisdiction

It has long been recognized that courts are ill-suited for resolving the numerous complex factual issues involved in setting rates for regulated industries. Courts presented with such questions have consistently deferred to the greater experience and expertise of the relevant regulatory agency. Pursuant to the doctrine of primary jurisdiction, courts stay or dismiss court procedings pending resolution by the administrative agency of the issues within the latter's special competence.

> "Primary jurisdiction" . . . comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. . . .

United States v. Western Pac. Ry., 352 U.S. 59, 63-64 (1956). The doctrine provides "[u]niformity and consistency in the regulation of business entrusted to a particular agency...." Far East Conference v. United States, 342 U.S. 570, 574-75 (1952). "Uniformity can be secured only if ... determination is left to the Commission." Great N. Ry. v. Merchants Elevator Co., 259 U.S. 285, 291 (1922).

The doctrine of primary jurisdiction lends strong support to the notion that the RICO statute is inappropriately applied to the facts of this case. In reaching its verdict the jury was required to place itself in the shoes of the PSC, deciding for a fifteen year period what level of rates the PSC would have set but for certain alleged misrepresentations. It was compelled to attempt to understand numerous complex issues of rate regulation which arose in five rate proceedings, and three proceedings under § 149-b of the Public Service Law. The records in those proceedings contained thousands of pages of testimony and thousands of exhibits. The jury performed its task without the benefit of the PSC staff, without the expertise which the PSC has in rate matters, and without reading the testimony or the opinions at issue in the PSC proceedings.

Whatever doubt the court entertained before trial about the need to defer rate-related matters to the PSC was put to rest by the evidence both sides had to present to the jury. The Public Service Commission members and chairpersons who made the rate decisions were required to testify. They had to tell the jury why they now thought they made the many decisions they did over two decades; how, in retrospect, they might or might not have been affected in their decisions individually or collectively by different circumstances; and what the effect of their decisions on the welfare of the public might have been if they had had the hindsight now available to the jury. Such delving into the mental processes of a decisionmaker is as repugnant to federal policy when a state administrative fact finding body is involved as when a jury is the fact finder. See, e.g., Federal Rules of Evidence, Rule 606 (juror may not testify to "effect of anything upon . . . juror's mind . . . or concerning the juror's mental processes. . .").

As the Court of Appeals noted in the context of the continuing dispute between Suffolk and LILCO, County of Suffolk v. Long Island Lighting Co., 728 F.2d 52, 61 (2d Cir. 1984),

> Ratemaking is part of the Commission's daily work.

> The Commissioners have a large staff of experts to assist them with the more difficult technical aspects of regulating public utilities. In contrast, courts -- whether state or federal -- are ill-equipped to set electric rates. Were this Court, for example, to grant appellant its requested relief, it might reduce LILCO's rate base below the level required for LILCO to "break even" and, as a result, drive the company into bankruptcy or out of business. Also, if different courts could set different rates for electric power there would be no uniformity; and the question would arise, what rates govern? To avoid this possibility of confusion New York State confided to the PSC exclusive jurisdiction over rates.

This court recognized in its charge, which is the law of the case, that "[t]o say that a fraud was successfully committed against the PSC resulting in damages is, for practical purposes, to retroactively reduce electric rates." Charge p. 18.

The doctrine of primary jurisdiction applies even where a central issue is whether misrepresentations to an administrative agency resulted in rate increases. See Alberta Gas Chem., Ltd. v. Celanese Corp., 650 F.2d 9, 12 (2d Cir. 1981)("central issue" of the action was alleged misrepresentations before the commission).

An argument can be made that the primary jurisdiction doctrine should not be applied by a federal court to a state administrative agency where that course of action will frustrate a federal policy. But there is no reason to believe that allowing the PSC to set state electric rates and to exercise its own powers to roll back rates where it has been misled will frustrate RICO policy. See N.Y. Public Service Law §§ 5, 22, 66(5) and (12), 71, and 72 (establishing PSC and describing its ratemaking authority and procedures for administrative review); see also New York State Elec. & Gas Corp. v. Public Serv. Comm'n, 245 A.D. 131, 135, 281 N.Y.S. 384, 387-88 (3d Dep't 1935), aff'd, 274 N.Y. 591, 10 N.E.2d 567 (1937) (PSC has jurisdiction where utility furnishes "false basis for rates" resulting in an unreasonable charge upon the public); Alvarez v. Schwartz, 130 Misc. 2d 692, 694, 497 N.Y.S. 2d 602, 604 (Sup. Ct. N.Y. Co. 1985) (administrative agency may reopen decision tainted by fraud, citing People ex rel. Finnegan v. McBride, 226 N.Y. 252, 123 N.E. 374 (1919)).

The RICO statute does not inhibit application of the doctrine of deference. See, e.g., H.J., Inc. v. Northwest Bell Tel. Co., 648 F.Supp. 419 (D. Minn. 1986), aff'd on other grounds, 829 F.2d 648 (8th Cir. 1987), cert. granted, 108 S.Ct. 1219 (1988) (applying the "filed rate doctrine" to dismiss a claim brought under the RICO statute alleging damages as a result of alleged improprieties committed in connection with proceedings of the Michigan Public Utilities Commission); Meditech Int'l Co. v. Minigrip, Inc., 648 F.Supp. 1488, 1494-1495 (N.D. Ill. 1986) (applying the holding in Alberta to a damages claim under RICO predicated upon alleged fraud which allegedly resulted in the issuance of an order by the International Trade Commission banning the importation of certain plastic bags); cf. Nike, Inc. v. Rubber Mfrs. Ass'n, 509 F.Supp. 912, 917-918 (S.D.N.Y. 1981) (staying an antitrust claim based upon the alleged provision of false certifications by defendants to the United States Customs Service that resulted in the imposition of special duties on Nike shoes).

Federal courts have applied the doctrine where the claim is brought under federal law and the regulatory agency is a state body. See, e.g., H.J., Inc. v. Northwestern Bell Tel. Co., 648 F.Supp. 419 (D. Minn. 1986), aff'd on other grounds, 829 F.2d 648 (8th Cir. 1987), cert. granted, 108 S.Ct. 1219 (1988) (federal RICO action); Huron Valley Hospital v. City of Pontiac, 666 F.2d 1029 (6th Cir. 1981) (federal antitrust action); Industrial Communications Sys. v. Pacific Tel. & Tel. Co., 505 F.2d 152 (9th Cir. 1974) (federal antitrust action); Litman v. A. Barton Hepburn Hospital, [1982-83] Trade Cases (CCH) ¶65,161 (N.D.N.Y. 1983) (federal antitrust action); Denver v. Santa Barbara Community Dialysis Center, [1981-1] Trade Cases (CCH) ¶63,946 (C.D. Cal. 1981) (federal antitrust action); Association Tel. Answering Exchanges v. American Tel.

& Tel. Co., 492 F.Supp. 921 (E.D. Pa. 1980) (federal antitrust action).

2. Abstention

Inapplicability of RICO in this case also finds support in a long line of abstention cases beginning with the Supreme Court's decision in Burford v. Sun Oil Co., 319 U.S. 315 (1943). There the Court held that the district court properly declined to exercise jurisdiction of plaintiff's claims challenging the validity of an order of the Texas Railroad Commission. The Court found that "[d]elay, misunderstanding of local law, and needless federal conflict with the State policy, are the inevitable product" of federal adjudication of such claims. Id. at 327.

The concerns reflected in the Burford abstention are those of federalism and comity -- the notion that the federal government should accord a "proper respect for state functions." Younger v. Harris, 401 U.S. 37, 44 (1971); see Society for Good Will to Retarded Children v. Cuomo, 652 F.Supp. 515, 523 (E.D.N.Y. 1987). The Burford doctrine embodies these concerns by enabling a federal court to "abstain from interfering with ongoing state regulatory schemes." Levy

v. Lewis, 635 F.2d 960, 963 (2d Cir. 1980). Thus, in New Orleans Pub. Serv. v. City of New Orleans, 798 F.2d 858 (5th Cir. 1986), cert. denied, 481 U.S. 1023 (1987), the district court properly abstained from a suit involving a utility's application for a permanent rate increase. The complexity of utility regulation and the state's paramount interest in its regulatory system warranted abstention:

> The motivating force behind Burford abstention is ... a reluctance to intrude into state proceedings where there exists a complex state regulatory system.... As with the regulatory scheme at issue in Burford, the regulation and adjustment of local utility rates is of paramount local concern and a matter which demands local administrative expertise.

Id. at 861-62. And in Hanlin Group, Inc. v. Power Authority of the State of New York, No. CV-87-570 (S.D.N.Y. January 13, 1989), a rate dispute case concerning the sale of electric power, the court relied on the Burford doctrine to dismiss the plaintiff's claims because

> in deciding this case, the court would be inevitably drawn into the complex process of utility ratemaking in New York. That is precisely the activity area which Burford abstention intended to relegate to state adjudication.

Slip op. at 14. See also Levy v. Lewis, 635 F.2d 960, 964 (2d Cir. 1980) (abstention required where federal review of plaintiff's claim would interfere with New York's "complex administrative and judicial" insurance regulatory scheme); Law

Enforcement Ins. Co. v. Corcoran, 807 F.2d 38, 43-44 (2d Cir. 1986) (same); 15 U.S.C. §§ 1011-1015 (regulation of the insurance industry left to the states).

The fact that federal claims form the jurisdictional basis of a plaintiff's complaint is not significant in the application of Burford abstention. See Levy v. Lewis, 635 F.2d at 964 (observing that federal claims were present in the Burford case itself). Nor is there any requirement that complex issues of state law be presented for federal adjudication in order for Burford abstention to be appropriate. Id.; New Orleans Pub. Serv. v. City of New Orleans, 798 F.2d at 861.

The Burford doctrine has been held applicable to the adjudication of RICO claims that would interfere with important matters of local concern. See Dubroff v. Dubroff, 833 F.2d 557 (5th Cir. 1987) (RICO claims arising from divorce proceedings dismissed without prejudice to allow a plaintiff to pursue claims in Texas state courts); Bradenburg v. First Md. Savings and Loan, 660 F.Supp. 717, 734 (D. Md. 1987), aff'd, 859 F.2d 1179 (4th Cir. 1988) (RICO claims against savings and loan associations in state receivership dismissed).

Exercise of RICO jurisdiction in this case "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976) (describing circumstances under which Burford abstention is appropriate). Abstention is proper when, as here, monetary damages are being sought. Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 107-13 (1981).

State regulation of utilities is a matter of "substantial public concern." State interests in this area are enormous. See, e.g., Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 377 (1983) ("[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States."); Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind., 332 U.S. 507, 521 (1947) (the states have a "vital interest[] in the regulation of rates and service" where utilities are concerned).

Note should also be made of the Johnson Act, 28 U.S.C. § 1342. It bars federal courts from interfering with any state order affecting utility rates when: 1) jurisdiction is based solely on diversity or a constitutional claim; 2) the order does not interfere with interstate commerce; 3) the order has been made after reasonable notice and hearing; and 4) there is an adequate remedy in the state courts. The Act does not by its terms apply to a RICO action, but it is another strong indicator that Congress intended state ratemaking to be free from unnecessary federal court intrusions. See Miller v. New York Pub. Serv. Comm'n , 807 F.2d 28, 32-33 (2d Cir. 1986) ("the aim of Congress [with the Johnson Act] was to remove completely the subject of utility rates from the federal courts," and thus "abolition of jurisdiction in the federal courts ... must [be] read to reach broadly over all jurisdiction in rate cases, including the awarding of money damages"); Hanna Mining Co. v. Minnesota Power & Light Co., 739 F.2d 1368, 1370 (8th Cir. 1984) ("The Act is to be broadly applied to keep challenges to orders affecting rates out of the federal courts.").

There is no need to describe other related abstention doctrines at this time except to note that they interact in this case to strengthen the conclusion that RICO does not require manhandling a subtle and comprehensive state regulatory scheme. See, e.g., L. H. Tribe, American Constitutional Law, 195-201 (2d ed. 1988); C. A. Wright, Law of Federal Courts § 52 (4th ed. 1983).

3. "Our Federalism"

The protection of state institutional autonomy is a matter of deep concern to federal courts. Even in the case of constitutional challenges federal courts have become increasingly reluctant to interfere with state enforcement of state laws in state courts and administrative agencies. L. H. Tribe, American Constitutional Law, 201-08 (2d ed. 1988); C. A. Wright, Law of Federal Courts §52A (4th ed. 1983). Younger v. Harris, 401 U.S. 37 (1971), illustrates one phase of this approach in the area of criminal law. "Our Federalism," the Supreme Court pointed out is

> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 44. In recent years the Court has broadly applied the principles articulated in Younger to require abstention by federal courts in order to protect the integrity of state adjudication of civil matters. Pennzoil Co. v. Texaco, 481 U.S. 1 (1987) (state judicial proceedings); Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619 (1986) (state administrative proceedings).

Among the recent manifestations of this reluctance to unnecessarily upset the balance of power between Washington and state capitals are cases such as Pennhurst State Schools and Hospital v. Halderman, 465 U.S. 89 (1984). There the Court held that a federal court hearing constitutional claims brought against state officials may not entertain pendent claims that the defendants violated state law. Said the Court,

> [I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

Id. at 106. In the instant case it is apparent that while LILCO is the defendant, the challenge is really to the actions of the PSC and its commissioners under state law. Pursuant to New York law, the PSC is directed to set "just and reasonable" rates. New York Public Service Law §72. The federal court here is being asked to determine whether in fact the commissioners did so.

A construction of RICO which permits a jury to retroactively reduce electric rates may violate the Tenth Amendment to the United States Constitution. In Gulf Water Benefaction Co. v. Public Util. Comm'n of Tex., 674 F.2d 462 (5th Cir. 1982), the Court of Appeals affirmed the bankruptcy court's order dismissing an adversary petition that sought to enjoin rates promulgated by the Public Utility Commission of Texas. The court stated:

> [T]he power to regulate intrastate services such as utilities has historically been reserved to the states by Congress pursuant to the provisions of the tenth amendment of the United States Constitution. Public Utilities Commission for State of Kansas v. Landon, 249 U.S. 236, 39 S.Ct. 389, 63 L.Ed 791 (1919). In Texas [as in New York] it is fundamental that the fixing of domestic utility rates is a legislative function of the state government.

Id. at 467. See Brooklyn Union Gas Co. v. Maltbie, 245 A.D. 74, 281 N.Y.S. 233 (3d Dep't 1935) (ratemaking is a legislative function and the PSC exercises authority delegated to it by the state legislature); Montalvo v. Consolidated Edison Co., 92 A.D.2d 389, 398, 460 N.Y.S.2d 784, 790 (1st Dep't 1983), aff'd, 61 N.Y.2d 810, 473 N.Y.S.2d 972, 462 N.E.2d 149 (1984) ("the PSC is a delegate and alter ego of the Legislature").

The exercise of delegated legislative authority by a state administrative agency is a manifestation of the republican form of government guaranteed to the states by Article IV, section 4, of the Constitution. Highland Farms Dairy v. Agnew, 300 U.S. 608, 612 (1937). Sidestepping PSC review of utility rates by permitting ratepayers to petition a federal court to redress rate-related grievances denies the state a voice in these rate matters. It reduces the state's role without warrant or need and ultimately undermines the "guarantee to every State in this Union [of] a Republican Form of Government". U.S. Constitution, Article IV, section 4. See Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 789-90 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part); L. H. Tribe, American Constitutional Law, 397-98 (2d ed. 1988).

Recently the Supreme Court reaffirmed its great deference to the states in ratemaking when it rejected allegations that denying utilities compensation for abandoned nuclear plants constituted an unconstitutional taking. Duquesne Light Co. v. Barasch, 109 S.Ct. 609 (1989); Public Serv. Co. of N. H. v. New Hampshire, 109 S.Ct. 858 (1989). These cases recognized that ratemaking is essentially a state legislative matter whether control is exercised directly by a state legislature or indirectly by the legislature's nominee, a state public service commission.

4. Doctrine of Clear Statement

These intertwined federalism doctrines have led to the rule of "clear statement." L. H. Tribe, American Constitutional Law, 316 (2d. ed. 1988). Because of the expansive reach of federal power under the Commerce Clause, the Supreme Court is wary of applying congressional legislation to areas that Congress probably did not intend to reach. When application of legislation in particular situations might alter the federal-state balance, the Court looks for a "clear statement that Congress intended to exercise its ... power in full." Id. This occurs most notably, Tribe asserts, when state institutional interests are threatened. Id. See, e.g., Federal Trade Comm'n v. Bunte Bros., 312 U.S. 349, 355 (1941) ("An inroad upon local conditions and local standards of such far-reaching import as is involved here, ought to await a clearer mandate from Congress."). The purpose of the doctrine is to ensure that federal legislation is not applied in a manner that may alter the delicate balance of federal and state power unless Congress has carefully considered and fully intended such a result. United States v. Bass, 404 U.S. 336, 349 (1971). See, e.g., McNally v. United States, 107 S.Ct. 2875, 2881 (1987) (stating "[i]f Congress desires to go further it must speak more clearly than it has," the Court declined an expansive reading of the mail fraud statute, 18 U.S.C. §1341, that would "involve the Federal Government in setting standards of disclosure and good government for local and state officials.").

The doctrine is now more often invoked in the context of criminal law, but RICO is basically a criminal statute that may be used by private litigants in the civil arena. No specific language in RICO is ambiguous. Nevertheless, the great difficulty courts have had in applying the statute in civil cases indicates a general uncertainty of purpose -- i.e., ambiguity of scope.

Civil RICO cases provide dangers to defendants in some respects even greater than do criminal cases. In criminal cases proof beyond a reasonable doubt is required. In civil cases a preponderance of the evidence suffices. Cullen v. Margiotta, 811 F.2d 698, 731 (2d Cir.), aff'd sub nom. Nassau County Republican Comm. v. Cullen, 107 S.Ct. 3266 (1987) (preponderance of the evidence standard applies in civil RICO cases). Before a criminal RICO case can be brought, there must be an indictment by a grand jury and specific permission must be obtained from the Department of Justice, which has strict internal guidelines governing the prosecution of RICO actions. See United States Attorney's Manual, Title 9 at 9-110.300 et seq.; Sedima, 473 U.S. at 507 (Marshall, J., dissenting). There is no inhibition on the commencement of a civil RICO action except limits on the imagination of counsel. Here the nature of the charges are such that it is almost inconceivable that a RICO criminal prosecution would have been authorized or survived a motion to dismiss without trial. Because of the extreme dangers of overreaching in civil cases, care must be taken to ensure that the RICO statute is not extended beyond the reach envisaged by Congress.

In civil cases the Court has repeatedly applied the rules of deference to spheres of activity traditionally left to the states. It has invoked the doctrine to restrict the scope of both statutes and administrative regulations in protecting state sovereignty. For example, in Santa Fe Industries v. Green, 430 U.S. 462 (1977), the Court declined to read section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j, as providing a private remedy for the breach of corporate fiduciary duty alleged by the plaintiff. Said the Court,

> [T]his extension of the federal securities laws would overlap and quite possibly interfere with state corporate law.... Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden.

Id. at 479 (emphasis added). In Bowen v. American Hospital Ass'n, 476 U.S. 610, 106 S.Ct. 2101 (1986), the Court rejected a national administrative regulation designed to protect handicapped infants. The regulation had been adopted pursuant to section 504 of the Rehabilitation Act of 1973. 29 U.S.C. §794. The plurality opinion relied heavily upon "our federal system", *id.*, 106 S.Ct. at 2121, and the need to defer to a tradition of state and parental control of children's welfare unless Congress clearly indicates an intent to override state powers. The Court noted:

> Congress has failed to indicate, either in the statute or in the legislative history, that it envisioned federal superintendence of treatment decisions traditionally entrusted to state governance. "[W]e must assume that the implications and limitations of our federal system constitute a major premise of all congressional legislation, though not repeatedly recited therein." *United States v. Gambling Devices*, 346 U.S. 441, 450 (1953) (opinion of Jackson, J.) [footnote omitted]. Congress therefore "will not be deemed to have significantly changed the federal-state balance," *United States v. Bass*, 404 U.S. 336, 349 (1971) -- or to have authorized its delegates to do so -- "unless otherwise the purpose of the Act would be defeated," *Trade Comm'n v. Bunte Bros.*, 312 U.S. 349, 351 (1941).[33] Although the nondiscrimination mandate of § 504 is cast in language sufficiently broad to suggest that the question is "not one of authority, but of its appropriate exercise[,] [t]he propriety of the exertion of the authority must be tested by its relation to the purpose of the [statutory] grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise by the domain of state power, the justification of the exercise of the federal power must clearly appear." *Florida v. United States*, 282 U.S. 194, 211-12 (1931). Accord, *Chicago, M., St. P. & P.R. Co. v. Illinois*, 355 U.S. 300, 306 (1958).

Id., 106 S.Ct. at 2121-2122.

In its footnote 33 the plurality opinion for the Court collected many instances of deference to state regulatory power. An expansive interpretation of national legislation that overrides state authority is undesirable, the footnote indicated, unless it is necessary to carry out the clearly expressed aims of Congress. Footnote 33 reads as follows:

> Cf. *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 281-282, (1972) ("'[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance.'" (quoting *United States v. Bass*, 404 U.S. 336, 349, (1971))); *Davis Warehouse Co. v. Bowles*, 321 U.S. 144, 152, (1944) ("Where Congress has not clearly indicated a purpose to precipitate conflict [between federal agencies and state authority] we should be reluctant to do so by decision." (footnote omitted)); *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261, 275, (1943) ("An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous"); *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 354-355, (1941) ("The construction of § 5 [of the Federal Trade Commission Act] urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law.... An inroad upon local conditions and local standards of such far-reaching import as is involved here, ought to await a clearer mandate from Congress"); *Apex Hoisery Co. v. Leader*, 310 U.S. 469, 513, (1940) ("The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to imputed to Congress"); *United States v. Altobella*, 442 F.2d 310, 313-316 (7th Cir. 1971); 3 C. Sands, Sutherland on Statutory Construction § 62.01, p.64 (4th ed. 1974) ("[T]he rule of strict construction [of

> statutes in derogation of sovereignty] serves a quasi-constitutional purpose in our federal system of split sovereignty by helping to secure both levels of sovereign power against encroachment by each other." (footnote omitted)).
>
> The legislative history of the Rehabilitation Act does not support the notion that Congress intended intervention by federal officials into treatment decisions traditionally left by state law to concerned parents and the attending physicians or, in exceptional cases, to state agencies charged with protecting the welfare of the infant. As the Court of Appeals noted, there is nothing in the legislative history that even remotely suggests that Congress contemplated the possibility that "section 504 could or would be applied to treatment decisions, involving defective newborn infants." 729 F.2d 144, 159 (1984). "'As far as can be determined, no congressional committee or member of the House or Senate ever even suggested that section 504 would be used to monitor medical treatment of defective newborn infants or establish standards for preserving a particular quality of life. No medical group appeared alert to the intrusion into medical practice which some doctors apprehend from such an undertaking, nor were representatives of parents or spokesmen for religious beliefs that would be affected heard.'" Id., at 158 (quoting American Academy of Pediatarics v. Heckler, 561 F.Supp., at 401).

Id., 106 S.Ct. at 2121 n.33.

The "clear statement" doctrine indicates that in this case federal review through RICO of state regulatory decisions is inappropriate. The Supreme Court has said that when Congress legislates in a field

> traditionally occupied by the states, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' This assumption provides assurance that

> 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts.

Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). See also Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983) (balancing state and federal interests and concluding that state interest in regulating wholesale rates of rural power cooperatives outweighs federal concerns when the effect of the state regulation upon interstate commerce is not excessive and Congress has not specifically forbidden this assertion of state authority). On its face the RICO statute may not appear to be legislation in a field "traditionally occupied by the states." To apply the statute to the facts of the present case would, however, lead to exactly that result -- the intrusion of federal authority into an area historically reserved to state control. In such a situation the "clear statement" doctrine and the federalism concerns that underlie it are properly invoked.

Suffolk attempts to minimize the extent to which its RICO claims intrude into the sphere of state ratemaking authority by characterizing the relief it seeks as monetary damages rather than affirmative rate relief. Contrary to its contentions, its alleged injuries are in the form of utility rate increases previously approved by the PSC. Moreover, the damages it seeks are an amount equal to that portion of these rate increases that would -- in its submission -- not have been granted by the PSC except for the defendants' alleged misrepresentations.

The distinction that Suffolk attempts to draw between damages measured by rate increases and affirmative rate relief is illusory. Where a plaintiff seeks to recover damages measurable by a comparison between approved utility rates and rates that would have been approved but for a defendant's wrongdoing, the plaintiff's claim is treated as one for rate relief. See, e.g., Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981); County of Suffolk v. Long Island Lighting Co., 554 F.Supp. 399 (E.D.N.Y. 1983), aff'd, 728 F.2d 52 (2d Cir. 1984); H.J., Inc. v. Northwestern Bell Tel. Co., 648 F.Supp. 419 (D. Minn. 1986), aff'd on other grounds, 829 F.2d 648 (8th Cir. 1987), cert. granted, 108 S.Ct. 1219 (1988).

Rate relief obtained through a federal RICO action, whether provided in the form of monetary damages or otherwise, is highly disruptive of New York's regulatory scheme. Under New York law, the PSC has exclusive jurisdiction over utility rates, and the administrative remedies provided by the state supersede all other remedies. Purcell v. N.Y. Central R.R., 268 N.Y. 164, 171, *appeal dismissed*, 296 U.S. 545 (1935); *Van Dusen-Storto Motor Inn, Inc., v. Rochester Tel. Corp.*, 42 A.D.2d 400, 403, 348 N.Y.S.2d 404, 407 (4th Dep't 1973), *aff'd mem.*, 34 N.Y.2d 904, 359 N.Y.S.2d 286, 316 N.E.2d 719 (1974); *Central Hudson Gas & Elec. Corp. v. Napoletano*, 277 A.D. 441, 443, 101 N.Y.S.2d 57 (3d. Dep't 1950); *Cardone v. Consolidated Edison Co.*, 197 Misc. 188, 190, 94 N.Y.S.2d 94, 97 (N.Y. App. Term.), *aff'd*, 276 A.D. 1068, 96 N.Y.S.2d 491 (1st Dep't 1950). *See also County of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52, 61 (2d Cir. 1984) (affirming dismissal of Suffolk's common law claims, including misrepresentation, arising out of the Shoreham construction). When fraud in the ratemaking process is suspected, "the jurisdiction of the [Public Service] Commission at once attaches." *New York State Elec. & Gas Corp. v. Public Serv. Comm'n*, 245 A.D. 131, 135, 281 N.Y.S. 384, 387-88 (3d Dep't 1935), *aff'd*, 274 N.Y. 591, 10 N.E.2d 736 (1937).

The undeniable effect of permitting federal court review of claims such as those brought by Suffolk is to bypass state review of allegations of fraud in the ratemaking process. It allows litigants to short circuit the elaborate state scheme provided by New York for review of rate-related matters. *See HMK Corp. v. Walsey*, 828 F.2d 1071, 1076-77 (4th

Cir. 1987), cert. denied, 108 S.Ct. 706 (1988) (questioning application of RICO to local zoning dispute). Thus the application of RICO in a case such as this results in a federal abrogation of New York's decision that review of rate-making matters should be exclusively the province of the state-created remedial scheme.

The practical effect of permitting federal review of these claims under the RICO statute -- with its lure of treble damages and attorneys' fees -- will be that in the future ratepayers will bring many such claims in federal court. The PSC might well initiate its own investigation into the claims, but then the problems of federal-state coordination are enormous. For instance, what effect should the PSC give to a federal jury's determination that the PSC itself was the victim of a utility's fraudulent misrepresentations? And what effect should the PSC give to a jury's determination that the misrepresentations influenced its rate decisions in specific ways? Suppose that in its own investigation the PSC reaches different conclusions with regard to these matters. Can the PSC then ignore the jury verdict? If not, the state will be effectively deprived of a meaningful opportunity to arrive at its own determinations with respect to these claims. It will be left without the means to bring its expertise in ratemaking matters to bear, and it will be unable to frame relief that is harmonious with the wider state regulatory scheme and that is informed by uniquely local perspectives on such matters of overwhelmingly local concern.

In the very case now before us we were informed that the PSC was withholding decisions on rate applications of LILCO, claimed to be essential to forestall bankruptcy, pending decision of this RICO case. We are not left to speculation. RICO as sought to be applied by Suffolk was interfering with New York's regulatory scheme.

We should not assume that Congress intended to alter the historic federal-state balance in so dramatic a fashion. If the end result of entertaining claims such as Suffolk's in federal court is a defacto preemption, depriving the states of the opportunity to consider the claims in a meaningful fashion and upsetting the exclusive remedial measures provided by states for review of rate regulation matters, federal courts must assume that Congress intended that we refuse to hear the claims. See Sedima, 473 U.S. at 507 (Marshall, J., dissenting).

What makes the application of RICO in this situation especially inappropriate is that national power is being utilized not as the result of an affirmative decision by the national government to intrude into state regulatory affairs in order to vindicate important federal interests, but as the result of actions by private litigants. The process-based protection of state sovereignty envisaged by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-55 (1985), is short-circuited when a broadly framed statute such as RICO is used by private persons or local governments in ways that upset the balance of federal-state power that were never forseen by the state representatives in Congress who approved the statute.

Even in the field of nuclear safety regulation where the national interest is strongly asserted, the Court has refused to find the states' institutions for protection of the public through its tort law preempted. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984). See also G. M. Vairo, Survey of Recent Preemption Cases, in ALI-ABA, I Trial Evidence, Civil Practice and Effective Litigation Techniques in Federal and State Court, 255 (S. Schreiber ed. 1988). Federal law is, where reasonably possible, construed to avoid destruction of a state program to protect its citizens.

Balancing of pragmatic considerations in our complex scheme of separation of powers and of governmental functions between state and national governments requires some national humility in the face of historical experience. Cf. e.g., Mistretta v. United States, 57 U.S.L.W. 4102, 4107 (1989) (upholding sentencing guidelines on historic and pragmatic grounds). History as well as policy warrants leaving electric power rate regulation to skilled state commissions rather than to federal RICO juries unless Congress plainly requires otherwise.

Dismissal of unfounded claims after a trial at which the plaintiff obtained a verdict in its favor is sound practice. See, e.g., Apex Hosiery v. Leader, 310 U.S. 469 (1940) (invoking doctrine of "clear statement" to dismiss plaintiff's claims after plaintiff had obtained a jury verdict in its favor and an award of damages in excess of $700,000); Alabama Pub. Serv. Comm'n v. Southern Ry. Co., 341 U.S. 341 (1951) (relying on Burford abstention to reverse a trial verdict in favor of plaintiff); United States v. Yellow Freight Sys., 762 F.2d 737 (9th Cir. 1985) (applying doctrine of primary jurisdiction to set aside a trial verdict in favor of plaintiff).

No right of Suffolk to a jury trial, provided by the Seventh Amendment to the United States Constitution, is implicated by the dismissal of the County's claims. When, as here, federal law provides no basis for the exercise of federal jurisdiction, there is no cognizable cause of action to which the Seventh Amendment guarantee can apply.

IV. CONCLUSION

RICO does not apply to a rate regulation case such as the one before us. Suffolk's claims are dismissed without costs or disbursements.

The court recognizes the difficult emotional, economic, environmental and political issues surrounding Shoreham. It is not too late to settle these swirling controversies. There is no time better than now for resolution of the entire controversy. Even this case can go on almost indefinitely during protracted appeals which can only benefit the lawyers and put LILCO at further risk. Removal of uncertainty by the parties and officials is essential to the welfare of Long Island.

So ordered.

Dated: Brooklyn, New York
February 11, 1989
Amended April 14, 1989

Jack B. Weinstein

Jack B. Weinstein
United States District Judge

Sen. [illegible]

Kenneth Feinberg

PANEL III

QUESTIONS FOR THE PANEL MEMBERS

1. Are any of you aware of national efforts to amend existing RICO laws in the individual states?

No.

2. Because of the potential high costs of defending a RICO action, do any of you support awarding attorneys' fees to a defendant who can show that he is the subject of a frivolous RICO claim?

Yes

3. Do you feel that under the current RICO statute, federal judges have enough flexibility to summarily dismiss RICO claims they feel are abusive of Congressional intent?

Yes, although all too frequently judges seem unwilling to dismiss abusive RICO claims. The single best example of a court's willingness to dismiss a RICO claim -- even after jury verdict -- was Judge Weinstein's action in the case where I acted as court-appointed mediator, County of Suffolk, et al. v. Long Island Lighting Co. This opinion is a good example of a judge acting in a way designed to limit RICO abuses.

Senator DeConcini. Mr. Lacovara.

STATEMENT OF PHILIP A. LACOVARA, CHAIRMAN, BUSINESS/LABOR COALITION FOR CIVIL RICO REFORM, WASHINGTON, DC

Mr. Lacovara. Thank you, Mr. Chairman. I am back here before the committee this time in my capacity as the chair of the Business/Labor Coalition for Civil RICO Reform. This is a coalition of a variety of the groups, some of whom have already been heard from today, who have been working actively for RICO reform because of a common sense that this statute is out of control and something needs to be done.

We try to emphasize in my statement that despite the ad hominem attacks of some of the opponents that this is special-interest legislation, the breadth of the proponents should be put the lie to that allegation. We go the spectrum of the legitimate business organizations, legitimate labor organizations, the American Bar Association, the American Bankers Association, and the American Civil Liberties Union.

When you find that coalition banding together to say something needs to be done by Congress, it seems to me that the case is prime facie made that something should be done.

The other witnesses have demonstrated in rather concrete terms how this statute is out of control. I don't think there is any fair basis to challenge that it is doing what Congress intended that it not do when it passed the statute in 1970.

When you look at the legislative history, Mr. Chairman, you see that Congress was trying to protect legitimate business and legitimate labor from the infiltration of organized crime, and there was a very commonsense understanding of what that meant. It meant professional criminal enterprises.

In the criminal side, that is what RICO is being used by the Justice Department to combat. In the civil side, almost without exception, civil RICO is being used against legitimate business, against legitimate labor and, as Senator Grassley said, against protestors with a political agenda. So we have come a long way from 1970. This statute is not doing what it was designed to do. It is achieving the contrary view.

We are not alone in suggesting the need for reform. There have been some references this morning to the Chief Justice's comments, and he speaks not simply as one of several hundred Federal judges. He speaks as the head of the judiciary.

And as you know, Mr. Chairman, the Judicial Conference of the United States, which is the official arm of the Federal judiciary, has at least on two occasions called upon Congress to do something dramatic about the over-use of civil RICO.

That reflects the day-to-day experience of the Federal judges with the caseload growth that is unwarranted, with the federalism impact that Mr. Feinberg and others have mentioned, and with the general distortion not just of State law principles, but even of Federal law principles that Congress has crafted, for example, under the securities laws. All of these bodies of jurisprudence have been displaced by a statute that was never intended to have that dramatic an impact on our jurisprudence.

A footnote here, Mr. Chairman, on the caseload issue. Mr. Twist said that Mr. Blakey and others have demonstrated that there is no flood of RICO litigation. I think it is not an accurate characterization of the facts to make that point.

The administrative office of the U.S. courts itself acknowledges that there have been thousands of RICO cases filed in recent years. But as I try to explain in my statement, even those numbers understate the actual impact of RICO cases.

It is not sensible to treat every case as fungible. There are 200,000 or 300,000 cases filed in the Federal courts every year, but as the Federal judiciary knows, and as the Judicial Conference and the Chief Justice's statements indicate, the thousands of RICO cases are qualitatively more complicated and less appropriate than the bulk of the civil cases being filed in Federal courts, most of which are relatively straightforward, can be easily dealt with, and deal with matters that are of primarily Federal concern. None of those points applies to the bulk of the civil RICO cases being filed in Federal court.

Finally, Mr. Chairman, in the statement which discusses a number of other points, we address the effective date provision of the statute and we explain why, especially in light of the fact that this statute is being used primarily for types of litigation for which it was not originally intended, the normal rule of law that changes in law apply to pending cases should be applied when Congress reforms civil RICO.

In fact, as part of this compromise legislation, we have agreed to cut back what would normally be the rule of law that has been in effect in this country since the early 1800's, from John Marshall's decision in the *Schooner-Peggy* case, which is that changes in law should apply to pending cases as well as to future cases.

The compromise effective date provision makes that general principle inapplicable if there has been a settlement or a judgment or if a court finds that it would otherwise be manifestly or clearly unjust to apply it.

That is an adequate safety valve for a small category of case that perhaps should be governed by the preexisting law. Otherwise, this reform law would reestablish the right balance, and we support, Mr. Chairman, the bill that you and other Senators have introduced.

[The prepared statement of Mr. Lacovara and response to questions follow:]

TESTIMONY OF

PHILIP A. LACOVARA

VICE PRESIDENT & SENIOR COUNSEL FOR LITIGATION AND LEGAL POLICY

THE GENERAL ELECTRIC COMPANY, FAIRFIELD, CONNECTICUT

and

CHAIRMAN OF THE BUSINESS/LABOR COALITION FOR CIVIL RICO REFORM

on S.438

THE CIVIL RICO REFORM ACT OF 1989

before

THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

June 7, 1989

Mr. Chairman and Members of the Committee, my name is Philip A. Lacovara. I am presently the Vice President and Senior Counsel for Litigation and Legal Policy for the General Electric Company in Fairfield, Connecticut. I am also currently serving as the chairman of the Business/Labor Coalition for Civil RICO Reform. This coalition, composed of a large cross-section of business and labor groups has been seeking reform of the private lawsuit provisions of the civil RICO statute for nearly four years. I am here today to pledge the Coalition's full support for S.438, the Civil RICO Reform Act of 1989, which Senators DeConcini, Hatch, and Heflin introduced in February of this year.

The Coalition that I represent here today would much rather prefer a simpler piece of legislation that would have gone further in addressing the inappropriate uses to which plaintiffs have put civil RICO. We supported such a proposal in 1985. However, this proposed legislation represents a compromise among many factions, compromises necessary in order to achieve civil RICO reform. This legislation, arrived at after several years of negotiation with various Congressional offices and competing legislative interests, is designed to correct some of the widely recognized flaws in the civil provisions of the current RICO statute. Although S.438 does not remedy all of the litigation abuses which civil RICO has instigated, it is the collective opinion of the members of the reform Coalition that this compromise legislation stands the best chance of passing both Houses of Congress in the 101st Congress. The RICO Reform Coalition is hopeful that this Committee will be able to move forward quickly in reporting this legislation to the full Senate. In that regard, S.438 is very similar in content to S.1523, the RICO reform legislation that this Committee passed unanimously in the 100th Congress. We urge you to endorse this proposal again during this Congress by approving S.438.

The primary purpose of S.438 is to limit the use of civil RICO by plaintiffs in civil litigation that has historically been tried in state court or should be litigated under directly applicable existing federal statutes. Four years ago, the U.S. Supreme Court recognized that civil RICO has gone far afield from the original intent of its authors, and said that its remedy lay in the Congress, not in the courts:

> "It is true that private civil actions under the statute are being brought almost solely against such defendants [respected and legitimate businesses], rather than against the archetypal, intimidating mobster. Yet this defect -- if defect it is -- is inherent in the statute as written, and its correction must lie with Congress." Sedima, S.P.R.L. v. Imrex Co., Inc., 105 S.Ct. 3275, 3286-3287 (1985) (footnote omitted)

More recently, Chief Justice Rehnquist reiterated the need for reform of the civil RICO statute. He stated:

> "Virtually everyone who has addressed the question agrees that civil RICO is now being used in ways that Congress never intended when it enacted the statute in 1970. Most of the civil suits filed under the statute have nothing to do with organized crime. They are garden-variety civil fraud cases of the type traditionally litigated in state courts." (Remarks of the Chief Justice, Brookings Institution Eleventh Annual Seminar on the Administration of Justice, Williamsburg, Virginia, April 7, 1989, at 11)

Moreover, the effort to reform this runaway statute is supported by an extraordinarily broad-based coalition. The following groups have all been active in petitioning Congress to amend civil RICO substantially:

American Bar Association
National Association of Manufacturers
American Civil Liberties Union
U.S. Chamber of Commerce
AFL-CIO
American Institute of Certified Public Accountants
Securities Industry Association
American Bankers Association
Independent Bankers Association of America
Future Industries Association
American Council of Life Insurance
Credit Union National Association
Grocery Manufacturers of America
National Automobile Dealers Association
State Farm Insurance Companies
Alliance of American Insurers
American Financial Services Association

As might be expected, the opponents of RICO reform claim that it is special interest legislation. I find it difficult to believe that a coalition composed of the American Bar Association, and business, labor, and civil liberties groups can be characterized as a special interest. The breadth of the Coalition demonstrates the broad recognition that civil RICO has gone awry, and needs the remedy S.438 would provide. Under the circumstances, I submit that it is the effort to scuttle RICO reform to protect the particular interests of a few lobbying groups, private attorneys, and law professors that have developed a lucrative practice bringing civil RICO lawsuits that smacks more of protecting special interest in the face of demands of national public policy. This Committee should not be dissuaded by such parochial complaints from reaffirming its previous judgments on civil RICO reform.

The Legislative History of Civil RICO.

As one who has been intimately involved in the RICO reform effort since 1985, I think it would be instructive to review briefly the origin of civil RICO so that the Committee may clearly understand how the current use of this statute by private plaintiffs' attorneys differs so radically from that intended by Congress when it enacted RICO almost twenty years ago.

The Racketeering Influenced and Corrupt Organizations provisions of Title 18 became law in 1970 as part of the Organized Crime Control Act. In that Act, Congress provided a series of new weapons with which the federal government could confront the unique and growing problems that organized crime creates. The legislation was the product of an extensive series of hearings conducted over many years into the structure and methods of organized criminal syndicates in the United States. Those hearings and the legislative history of the Act demonstrate that in enacting this measure Congress thought it was attacking serious organized criminal activity.

The RICO provisions of the Organized Crime Control Act addressed the specific problems created when organized criminal syndicates infiltrated legitimate businesses. As long ago as the Kefauver Committee Hearings in the early 1950's, it was recognized that criminal syndicates often use the profits from organized crime operations to purchase and operate otherwise legitimate businesses. The Senate Committee Report on the Organized Crime Control Act demonstrates that RICO was a response to this specific problem:

> "It (Title IX) has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." (S.Rep. No. 91-617, 76, 91st Cong., 1st Sess. (1969))

As originally adopted by the Senate, RICO sought to prevent organized crime from controlling legitimate businesses by granting to the federal government civil powers to enjoin "enterprises" from engaging in a "pattern of racketeering activity," and by providing for criminal penalties for those enterprises that did engage in such activity. The statute defined a pattern of racketeering activity as two or more "predicate offenses" committed within a ten-year period. The statute listed as "predicate offenses" a wide variety of federal and state criminal offenses, including extortion, bribery, mail or wire fraud, and violation of the securities laws. The securities, mail, and wire fraud provisions were added to help the government pursue the increasing involvement of organized crime in dealing in stolen and counterfeit securities.

When the Senate passed it, RICO, in fact, did not even contain a private cause of action. However, when the House Judiciary Committee subsequently considered the legislation in late 1970, it added an amendment which provided for a private right of action and mandated treble damage awards and attorneys' fees. The Committee added the private cause of action with little consideration of the practical effects of attaching a private right of action for treble damages to the broad language of the statute's substantive provisions, which had been drafted with the understanding that the exercise of prosecutorial discretion would mitigate their sweep. As the U.S. Second Circuit Court of Appeals noted in reviewing the legislative history of the private civil RICO cause of action:

> "The addition was not considered an important one, a remarkable fact which in itself indicates that Congress did not intend the section to have the extraordinary impact claimed for it. Indeed, when the Judiciary Committee initially introduced the amended bill, it did not even announce to the House that it had made the addition." Sedima, S.P.R.L. v. Imrex Co., Inc., 741 F.2d 482, 489-490 (2nd Cir. 1984) (footnote omitted), rev'd on other grounds, 105 S.Ct. 3275 (1985).

Civil RICO Is Not Being Used, It Is Being Abused.

It is indeed ironic that a statute enacted to protect legitimate businesses from organized crime is actually being used to harass, intimidate and sometimes ruin these same legitimate businesses.

The RICO Reform Coalition and supporters of civil RICO reform often refer to the type of case we hope this legislation will discourage as an "abusive" civil RICO case. The Members of the Committee should not think that the term "abusive" is the equivalent of "frivolous" as lawyers generally use that term. Rather, any civil RICO suit that uses the statute's broad language to litigate in federal courts claims long-established under well-recognized state law causes of action, or to evade more directly applicable existing federal statutory regimes is "abusive" because it uses the statute in inappropriate ways.

For example, the 1985 study by the American Bar Association (ABA) of the use of civil RICO found that of the 270 reported civil RICO decisions in the federal courts in 1983 and 1984, 40 percent of these cases were based on allegations of securities fraud, and 37 percent were based on allegations of common law fraud in a business dispute. Only 9 percent of the reported RICO cases up to 1984 concerned the type of criminal conduct, such as extortion or arson, usually associated with organized crime. The ABA study concluded that civil RICO was "grossly overbroad, encompassing business transactions that could not have been foreseen or intended by Congress when it passed these provisions." These are the type of cases in which addition of a civil RICO count in the complaint is an abuse of the RICO statute.

I would also hasten to note that the number of reported civil RICO decisions represents only a fraction of the civil RICO claims actually being pursued. The threat of automatic treble damages, and of being labeled a racketeer forces many defendants to settle questionable cases without going to trial. Mr. Justice Marshall, in dissenting in the Sedima decision, recognized the extortionate pressure on a defendant to settle a civil RICO suit:

> "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat." Sedima, S.P.R.L. v. Imrex Co., Inc., (Marshall, J., dissenting) 105 S.Ct. at 3295.

Today, use of private civil RICO has turned the original intent of the statute on its head. Instead of a tool against organized crime and a protection for legitimate businesses, RICO has become a weapon to use against these very same legitimate businesses.

For a decade after its enactment the private civil RICO provisions were rarely used. Beginning in the early 1980's, however, the plaintiffs' bar began to discover that the broad language of the RICO statute, particularly its inclusion of the federal mail and wire fraud statutes as predicate offenses, permitted the characterization of ordinary commercial disputes as civil RICO cases. For example, an ordinary contract dispute tried in a state court generally includes an allegation of some type of fraud. If a plaintiff merely alleges that either the telephone or the mail was used more than once in the process of negotiating, drafting or breaching the contract, that plaintiff can transform a simple breach of contract case into full-blown federal RICO litigation in which the defendant is labeled a racketeer and is threatened with the prospect of paying a treble damage judgment.

While still on the 9th Circuit Court of Appeals, then Judge Anthony Kennedy had this to say about the extortionate use to which civil RICO is being put:

> "The potential range of criminal prosecution under the federal mail and wire fraud laws is vast, made so in part by expansive judicial interpretation. The reach of those statutes exists against a backdrop of prosecutorial discretion, however, discretion which, if sensitively exercises, operates as a check to the improvident exertion of federal power. No such check operates in the civil realm. A company eager to weaken an offending competitor obeys no constraints when it strikes with the sword of the Racketeer Influenced and Corrupt Organizations Act. It is most unlikely that Congress envisaged use of the RICO statute in a case such as the one before us...." Schreiber Distributing v. Serv-Well Furniture Co., 806 F.2d 1393, 1402 (9th Cir. 1986) (Kennedy, J., concurring) (citations omitted)

In the last eight years the abuse of the RICO statute in civil litigation has exploded both in the number of suits and in the ever expanding areas of litigation in which civil RICO is used. It is in the area of commercial litigation, as pointed out by Mr. Justice Kennedy and many other federal judges, that the use of civil RICO is truly running rampant.

For this reason, both the Chief Justice and the Judicial Conference of the United States has repeatedly called on Congress to cut back substantially on the opportunity to bring civil RICO cases.

The Percentage of Civil RICO Suits Being Filed In the Federal Courts Is Significant.

The inclusion of a RICO cause of action has become such a routine matter in ordinary litigation that one federal judge in the Northern District of Illinois has written, "Would any self respecting plaintiff's lawyer omit a RICO charge these days?" Papagrannis v. Pontikis, 108 F.R.D. 177, 179 (N.D.Ill. 1985). The answer to this question must be a resounding, "No!"

Although the opponents of civil RICO reform claim that civil RICO lawsuits make up only a small fraction of the civil suits actually being filed in the federal courts, a thorough study of the available information on civil case filings reveals this assertion cannot be supported. The Administrative Office of the United States Courts has released statistics which indicate that from November 30, 1985, to June 30, 1988, there were at least 2,668 civil RICO suits filed in the U.S. District Courts. This number, in fact, vastly underestimates the true number of private civil RICO claims filed in the federal district courts.

The Administrative Office bases its statistics on information recorded on Civil Cover Sheets, which every plaintiff in a federal court case files along with the complaint. The Civil Cover Sheet requires the plaintiff to check a single box which categorizes the "nature" of the lawsuit. Until the Civil Cover Sheet was revised in July 1986, there was no box to check for the filing of a civil RICO suit. In 1986, the Administrative Office added a specific civil RICO box to the form.

However, the Civil Cover Sheet specifically states that the party filling out the form should "place an X in one box only," when categorizing the nature of the action. In addition, the instructions on the reverse side of the Civil Cover Sheet state that "if the cause fits more than one nature of suit, select the most definitive." Civil RICO suits, particularly abusive civil RICO suits, by definition can always be characterized as another type of case as well -- securities fraud or breach of contract, for instance. A plaintiff is as likely to select one of those categories as they are likely to select RICO. In fact, they are more likely, since many plaintiffs' attorneys believe that many federal judges are hostile to civil RICO cases, and thus the attorneys are not likely to want to herald the fact that the complaint includes a RICO claim.

Therefore, there is every reason to believe that many, many cases that include RICO claims are counted in some other category in the Administrative Office's statistics. This undercounting is exacerbated by the fact that at least some district courts still accept the older Civil Cover Sheet that did not have a civil RICO box, and some even distribute the older form when they run low on the newer one.

In addition, as part of the 2,668 civil RICO cases filed in the District Courts as tabulated by the Administrative Office, they calculate that for the period from November 1985 to June 30, 1986, there were 614 RICO cases. Yet it is difficult to reconcile this figure given the fact that the Civil Cover Sheet used by the district courts which contains the RICO box for classification of the suit was, in fact, not put into use until July 1986. We can only assume that this number was produced from claims classified as "other statutory actions" and the plaintiff stated the cause of action as based on the RICO statute in the appropriate section of the old form. The figure thus derived must be extremely conservative.

The Business/Labor Coalition To Reform Civil RICO is confident that a significant percentage of the current civil filings in federal district courts are civil RICO suits. Discussions with federal judges consistently reveal that they are seeing many civil RICO claims on their dockets. Recent testimony before the House Subcommittee on Crime also supports the assertion that civil RICO is a much greater burden than opponents of this legislation contend. Perhaps as many as ten times the number of civil cases than the Administrative Office statistics reflect include a civil RICO claim as part of the complaint.

Any consideration of the numbers of civil RICO as a percentage of all federal filings, moreover, is misleading, because it fails to take into account the relative complexity of civil RICO suits. The vast majority of federal filings are social security cases and prisoner petitions, which are almost always simple cases for the courts to handle. In contrast, civil RICO cases can be among the most time-consuming and complex cases on a court's docket because of the variety of underlying criminal claims and violations of statutory and common law, and because of the plaintiff's ability to expand the scope of the claim to include a wide variety of the defendant's conduct over a long period of time.

This infusion of complex cases threatens the courts' ability to handle other cases of concern under federal law. That is why the Judicial Conference of the United States has twice called on Congress to reform the civil provisions of RICO substantially, and why the Chief Justice recently reiterated the need for substantial reform of this statute. It makes no sense to burden the federal courts with claims long handled under other state and federal laws simply because the broad language of RICO happens to sweep them in, especially when that burden threatens the courts' ability to provide fair and speedy justice in those matters properly brought before the federal judiciary.

Abusive Civil RICO Suits Are Not Being Summarily Dismissed.

The oft-repeated claim of the opponents of civil RICO reform is that federal court judges are dismissing all of the so-called "abusive" civil RICO suits. That assertion is simply not true. For example, some firms in the securities field no longer even file a motion to dismiss a RICO cause of action because they cannot get the counts thrown out -- a securities case is too easily pleaded as a RICO claim. I hasten to point out that these same companies rarely, if ever, lose a civil RICO claim at trial -- but at considerable cost in attorneys' fees and time lost to the demands of the wide-ranging discovery that a civil RICO claim permits.

The problem with civil RICO is not the suits that the language of the statute does not permit but are brought anyway, but the suits that fall within the language's broad net, which Congress constructed with criminal prosecutions in mind. The dilemma RICO poses is illustrated by two cases the U.S. Second Circuit Court of Appeals recently decided, one a civil RICO case and the other a criminal RICO case. These two cases presented similar issues regarding what constitutes a "pattern of racketeering activity."

The civil case, Beauford v. Helmsley, 865 F.2d 1386 (2nd Cir. 1989), involved a suit by a condominium owner and prospective condominium owners against a real estate partnership for mailing false statements regarding the state of repair of the buildings undergoing condominium conversion. Plaintiffs claimed that they had either purchased units relying on representations regarding, among other things, the plumbing repairs, or they had not purchased units because of high prices which they attributed to the same representations.

Both the trial court (Beauford v. Helmsley, 650 F.Supp. 548 (S.D.N.Y. 1986)), and a three-judge panel of the Second Circuit (Beauford v. Helmsley, 843 F.2d. 103 (2nd Cir. 1988)), determined that these mailings did not constitute a pattern of racketeering activity. The companion criminal case, United States v. Indelicato, 865 F.2d. 1370 (2nd Cir. 1989), involved the defendant's prosecution under criminal RICO for three simultaneous murders, which the jury found constituted a pattern of racketeering activity.

It is obvious from reading these two companion decisions that the Second Circuit, sitting en banc, greatly desired to uphold the dismissal of the civil case (Helmsley) while upholding the conviction in the criminal case (Indelicato). The source of the Court's dilemma was that legal precedents under RICO apply without distinction to both civil and criminal RICO cases. In other words, what was sauce for the civil goose, Helmsley, was also sauce for the criminal gander, Indelicato.

The Second Circuit struggled with this inherent tension in these two cases before finally conceding that it was better to open the floodgates of civil RICO than to let a convicted murderer go free. Thus, in order to uphold the conviction in Indelicato, with its three simultaneous murders, the Court had to embrace an interpretation of the "pattern" requirement that required the court to reverse the dismissal of the Helmsley case, even if it did not seem like a proper situation for a racketeering claim. This realization led the Helmsley court to lament the consequences of its decision:

> "We recognize that our reframing today of the enterprise and pattern requirements, and particularly our rejection of any requirements that there be multiple schemes or long-term goals or temporal separation of racketeering acts, will open the door to far more civil RICO cases than have heretofore survived our scrutiny. This more liberal approach is, however, required by the statute." Helmsley, 865 F.2d at 1393.

Judicial construction cannot limit the misuse of civil RICO without restricting criminal prosecutions to an equal degree. In sum, Helmsley and Indelicato underscore the urgency for legislative action that deals specifically with abuse of civil RICO. Congressional action appears to be the only means of curbing the abuse of the statute without limiting its effectiveness as a weapon against organized crime.

Civil RICO Is "Federalizing" State Fraud Law.

The critical problem of civil RICO which confronts our overburdened federal courts is not merely the filing of additional thousands of federal lawsuits each year. Civil RICO is displacing litigation that has traditionally been tried in our state courts. The claims of distress by our federal courts are legion in the reported decisions. The U.S. Circuit Court of Appeals for the Fourth Circuit, for instance, exclaimed its frustration in a civil RICO action brought by a land developer against a rival land developer for allegedly subverting a Virginia county's land use planning process:

> "In enacting RICO, Congress did not intend to preempt and federalize the field of state business law. . . . Section 1964(c) permits persons injured in their business or property by a RICO violation to recover treble damages and costs, including a reasonable attorney's fee. These strong incentives to civil enforcement carry with them the concomitant danger that traditional state causes of action aimed at rectifying individual instances of commercial misconduct will be relegated to a position of secondary importance. Such familiar state causes of action as common law misrepresentation and fraud, unfair trade practices, and wrongful franchise termination, not to mention the general run of commercial and contractual disputes, could be eclipsed or resolved primarily as pendent claims in federal court. To secure access to the federal courts and to recover treble damages and attorney's fees under RICO, litigants may attempt to recast such single, isolated schemes as a pattern of racketeering activity. To permit plaintiffs injured in such schemes to bring their claims under RICO would consign state law to unprecedented federal oversight irrespective of the parties' citizenship, and would deprive the states of jurisdiction over these local controversies in a way Congress never intended." HMK Corporation v. Walsey, 828 F.2d 1071, 1076 (4th Cir. 1987) (citation omitted)

How urgent is the need to eliminate the threat that civil RICO poses for "federalizing" state law and state court litigation? Judge Jack Weinstein of the Eastern District of New York recently wrote in overturning a $23-million RICO verdict awarded to a county government won against a state public utility arising from state utility hearings:

> ". . . no case, no language of the statute and no congressional finding has demonstrated that Congress and the President intended to overturn all federal doctrine and jurisprudence in federalizing the law of torts under RICO." County of Suffolk, et al. v. Long Island Lighting Company, et al., 87-CV-646 (JBW), (1989 WL 38992, E.D.N.Y., February 11, 1989)

Unfortunately, even Judge Weinstein's courageous action came only after discovery, after motions practice, after trial, and after a verdict. One has to speculate how many judges even then would have been willing to overturn such a highly publicized verdict or been willing to read the statute to exclude this type of claim. In addition, Judge Weinstein's bold decision does not offer much hope for relief in most other disputes that should turn on traditional state law principles, since he himself carefully limited his decision to a state-regulated utility rate dispute.

Civil RICO Is Also Distorting Federal Securities Laws.

Besides disrupting the historical boundaries between state and federal court jurisdiction, plaintiffs have found civil RICO to be an extremely useful tool for disrupting long-established areas of federal law, in which the courts and Congress have struggled mightily over the years to address the needs and conflicting concerns of public policy in a reasoned manner. Nowhere is this disruption more apparent than under the securities laws. Federal securities regulation now extends back over fifty years. In that time, Congress has repeatedly reviewed the status of the law, the needs of the securities markets, and considered carefully when and how to alter or fine-tune the statutory provisions to best serve the needs of the investing public, the markets, and all the citizens of the United States. The courts similarly have worked hard over the years to develop judicial interpretations and doctrines that best reflect the wording and intent of the statutes. Yet, as Justice Marshall pointed out in his dissent in the Sedima case, civil RICO is having the disastrous effect of "virtually eliminating decades of legislative and judicial development of private civil remedies under the federal securities laws." Sedima, 105 S.Ct. at 3295.

Justice Marshall's words should be given serious weight, if for no other reason than he can hardly be accused of speaking for special interests, especially the industries and professions regulated by federal and state securities laws. The statistics, moreover, support his position. Every survey of civil RICO cases of which I am aware indicate that somewhere around forty percent of all the civil RICO cases arise from securities transactions. This is not surprising, since the plaintiffs' securities bar is among the most sophisticated, and therefore was both one of the first to recognize the value of appending a RICO count to its cases and also among the most adept at meeting whatever pleading requirements the law and judicial interpretation establish. In addition, given the nature of securities transactions, the number of documents usually involved, and the wide dissemination they receive, it is an easy task to plead the typical securities case, which already usually includes an allegation of fraud, as a civil RICO case.

Congress and the Courts have worked hard to establish the system for regulating the securities markets, including the nature and extent of private remedies. If there is a case for altering those laws, then Congress should address them as it always has -- directly, through consideration of the particular needs and concerns at issue and by crafting statutes designed to respond to those considerations. It makes no sense to allow this blunderbuss statute, designed to attack "racketeering," to undermine randomly and arbitrarily the system that the Congress and the federal courts think is the proper one for overseeing one of the most critical components of our economy.

S.438 Is A Fair and Balanced Compromise.

As I mentioned earlier, the Coalition believes that S.438, while far from a perfect RICO reform bill, is a fair compromise between the competing interests that have been heard on this issue. It reflects in substance the results of long and arduous negotiations with some of those who now stand in unyielding opposition to any effective civil RICO reform. It goes about as far as we believe anyone who supports the need for effective reform can go in limiting the impact of reform. In this regard, let me note that S.438 does not limit in any way the ability of any plaintiff to bring a civil RICO claim; any plaintiff who has a claim today will have one if Congress enacts the bill. Indeed, several provisions, such as international service of process, survivorship of claims, and the addition of predicate acts, will make it possible for more plaintiffs, not fewer, to sue under civil RICO than can do so today.

All that the bill does is to pare down one the categories of suits in which automatic treble damages and attorney's fees are available, and to require some plaintiffs who can still seek treble damages to prove that the conduct in question is as egregious as we have heard repeatedly over the years that it indeed is in the cases for which we are told civil RICO must remain available. This minimal paring back on the incentives to abuse civil RICO is the least that the record of misuse of the statute demands. I do not believe that those pressing for reform could support anything less. Quite honestly, current law would be better than a bill that promised reform but delivered less than would S.438 to help the victims of the civil RICO statute.

I will not take the time today to rehearse the reasons why the general approach taken in S.438 is a proper and fair one. In its general approach and in most of its specific provisions, the bill is identical to S.1523, which this Committee approved unanimously just one year ago. Various members of the Coalition testified last year in support of the bill in the form that the Committee approved it, and the reasons offered then and which the Committee apparently embraced remain as valid today as they did twelve months ago.

The remainder of my statement will address a few particular provisions in the legislation that are different from last year's bill. This will explain why the Coalition believes that these changes have improved the legislation, and why S.438 better serves the goals and purposes that this Committee's unanimous vote on S.1523 reflected.

The Effective Date Provision of S.438 Is Fair.

One issue of continuing controversy is the effect of S.438 on pending suits. It is important to understand what S.438 would not do to pending civil RICO suits: First, no pending cause of action would be dismissed; any plaintiff who had a valid civil RICO claim before this legislation passed would have one afterwards. Second, no RICO plaintiff in a pending case who would be eligible for multiple damages of any kind under S.438 would lose their claim for automatic treble damages; only those suits in which Congress determines single damages should be sufficient would be affected. Third, even if a plaintiff's damage claim is affected and his claim would become one for full actual damages, he will also be able to recover attorneys' fees, costs, and reasonable litigation expenses he has incurred, perhaps in reliance on the prospect of treble damages. In other words, he will be made whole. He will not suffer any loss because he thought he could pay for his expenses out of the treble damage windfall. Fourth, in any case in which a judgment has been entered or a settlement has been reached or is on appeal, the treble damage remedy would remain untouched. Fifth, even if the plaintiff is one who would ordinarily be proceeding for actual damages, if he can show that, under the facts and circumstances of his case, "in light of all the circumstances, such a limitation of recovery would be clearly unjust," he will still be able to collect automatic treble damages.

S.438 in fact goes far beyond what established case law would demand in ameliorating the impact of changes in the statutory law on pending cases. According to well-established principles of federal case law, a court -- whether trial or appellate level -- must apply any new federal law at the time it enters judgment, unless doing so would result in manifest injustice or there is a statutory directive or legislative history to the contrary. Bradley v. School Board of City of Richmond, 94 S.Ct. 2006 (1974). In Bradley, the Supreme Court fashioned a three-prong analysis to determine whether "manifest injustice" would result from the application of a new federal law to a pending case. The Bradley three-prong analysis focuses upon:

(a) the nature and identity of the parties;

(b) the nature of their rights; and

(c) the nature of the impact of the change in law upon those rights.

Bradley, 94 S.Ct. at 2019.

Dozens of reported federal court opinions since Bradley have analyzed the application of new federal legislation to pending cases in light of this three-prong analysis. The consistent holding of the federal courts since Bradley is that application of a change in remedy does not work a manifest injustice on the party affected -- either the plaintiff or the defendant.

For example, in Ames v. Merrill Lynch, Inc., 567 F.2d 1174 (2nd Cir. 1977), a customer sued his broker to recover damages for alleged excessive trading of his commodities account. The broker claimed the controversy should be submitted to arbitration, as provided in the customer's agreement Ames had signed in 1975. The trial court agreed with the broker, and compelled arbitration. The customer appealed, challenging the validity of the arbitration clause, based on the 1976 promulgation of a Commodity Futures Trading Commission regulation which rendered such arbitration agreements null and void. Employing the three-prong analysis of Bradley, the Second Circuit determined that arbitration was a procedural remedy, not a substantive right, and that application of a change in remedy was appropriate. Stating that Congress has the power to foreclose a remedy if it lets stand an adequate remedy in its place, and that no one has a vested right in any given mode of procedure, the court held, ". . . so long as a substantial and efficient remedy remains or is provided, due process is not denied by a legislative change." Ames, 567 F.2d at 1180.

Similarly, in Hastings v. Earth Satellite Corp., 628 F.2d 85, 93 (D.C. Cir. 1980), the D.C. Circuit Court of Appeals summarized the propriety of applying a statutory change in remedy to a pending suit:

> "When Congress fails to make its intentions absolutely clear, courts are much more inclined to apply retroactively amendments directed at the remedy rather than changes in substantive rights. Retroactive modification of remedies normally harbors much less potential for mischief than retroactive changes in the principles of liability. Persons and employers must be able to base their conduct on what they believe the law to be. Retroactive creation of legal responsibilities or abolition of legal rights risks unfairness because the retroactive change confounds the expectations upon which persons acted. Retroactive modifications in remedy, on the other hand, often do not involve the same degree of unfairness.... Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known. For this reason, absent contrary direction from Congress, courts are more inclined to apply retroactively changes in remedies than changes in liability." (citation and footnotes omitted; emphases added)

Numerous other federal cases in virtually every jurisdiction have consistently held that application of changes in remedial provisions of statutes to pending cases is appropriate. See, e.g., Kulkarni v. Nyquist, 446 F.Supp. 1274 (N.D.N.Y. 1977) (amendment providing attorneys' fees in Civil Rights Act suit appropriately received retroactive application as a remedial change in the law and not one which altered the parties' substantive obligations); Central States, Southeast, and Southwest Areas Pension Fund v. Alco Express Company, 522 F.Supp. 919 (E.D. Mich. 1981) (amendment providing attorneys fees and double interest on unpaid pension fund contributions as liquidated damages retroactively applied as it was remedial in nature and did not deprive defendant of a vested right or impose an unanticipated burden); Eikenberry v. Callahan, 653 F.2d 632 (D.C. Cir. 1981) (amendment eliminating $10,000 amount-in-controversy requirement for federal question jurisdiction applied retroactively); Seniors United for Action v. Ray, 675 F.2d 186 (8th Cir. 1982) (a federal regulation governing certain Medicaid notice requirements given retroactive application since it provided procedural framework for states to alter Medicaid benefit levels and did not create or enlarge any rights previously had by plaintiffs); Friel v. Cessna Aircraft Co., 751 F.2d 1037 (9th Cir. 1985) (statute extending the two-year limitation period to three years for actions under Death On The High Seas Act properly received retroactive application since it affected only a remedial provision and not one which altered the effect given to conduct); and Ratliff v. Wellington Exempted Village School Board of Education, 820 F.2d. 792 (6th Cir. 1987) (Supreme Court's prohibition of giving a certain jury instruction on compensatory damages given retroactive affect).

If S.438 contained no provision concerning when and how it should be effective, therefore, pursuant to Bradley, the federal courts would apply RICO reform legislation to all pending cases, whether they were in discovery, at trial, or on appeal. The provision in S.438, however, does not go as far as would the application of the Bradley standard in affecting pending litigation. First, only a limited category of pending cases would even be potentially affected: most categories will not be affected by the change in law. Second, even plaintiffs in those pending cases affected are provided with additional awards of fees and costs to ensure that they are "made whole." Third, the standard that the courts are to apply to determine if even those limited categories of pending cases should have their potential recovery affected, "clearly unjust in light of all circumstances," is lower than the Bradley standard. It is a subjective standard, providing complete discretion to the trial judge, whereas the Bradley analysis is essentially a much more restrictive, objective one.

Thus, the effective date provision of S.438 should be understood as reflecting a fair compromise between the competing interests of all parties to a pending civil RICO lawsuit. It goes much further than federal law ordinarily would demand in protecting plaintiffs in pending suits. At the same time, it takes into account the inherent unfairness to defendants in pending civil RICO suits of permitting continued exposure to automatic treble damages in the very cases that form the record of abuse to which Congress is responding. Remember, Congress is in effect acting to remold the language of civil RICO to fit more closely with its original intent; it will be limiting damages because it does not believe that, in general, plaintiffs in the cases affected should be able to sue for windfall profits. Under those circumstances, it makes most sense to apply that reasoning to the pending suits that led Congress to that conclusion, rather than leaving out in the cold those defendants who had the misfortune to be sued before Congress could act to amend the law. It makes particular sense where, as here, a plaintiff will in any event be made whole and where, as here, a plaintiff whose case presents peculiar circumstances can present the facts to the judge and be allowed to continue to pursue treble damages if he is otherwise being treated unjustly.

In sum, far from being unusually harsh or unfair to plaintiffs with pending cases, the effective date provision of S.438 goes as far as reason allows in protecting plaintiffs with pending suits.

The Standard of Conduct For Recovery of Punitive Damages Is Fair.

Under S.1523, a plaintiff would have been obliged to prove that the defendant had acted in "wanton and conscious disregard of the plaintiff's rights" in order to be awarded punitive damages. The Committee Report accompanying S.1523 explicitly recognized, however, this standard had no basis in any court holding or other federal statute. S.438 remedies that problem. It provides a standard that is found in the law and thus will provide guidance to the federal courts.

S.438 provides that the predicate to punitive damages is proof that the defendant acted in a manner that was "consciously malicious or so egregious or deliberate that malice may be implied." The standard in S.438 is not intended to be any harder for a plaintiff to meet than was the standard in S.1523. Rather, the formulation of a standard of conduct is the one that the Supreme Judicial Court of Maine used in Tuttle v. Raymond, 494 A.2d 1353 (1985), and the Supreme Court of Arizona adopted in Linthicum v. Nationwide Life Insurance Company, 723 P.2d 675 (1986). I believe that anyone who examines those two decisions will find them to be well reasoned, thoroughly documented, and articulate. They arrive at a proper basis for the award of punitive damages. If this Committee concurs in that judgment, the only sensible conclusion is to adopt the formulation those decisions use -- as S.438 does. If this Committee decides on a different articulation of the standard for punitive damages, then it should use the formulation found in that source. But it would ill-serve the cause of justice and the fair application of the law to adopt a standard that has no anchor in the law, and no sensible guideposts in place to aid the courts in interpreting and applying the standard.

The Prior Criminal Conviction Provision Has Been Strengthened.

S.1523 provided that a plaintiff could bring a civil RICO claim for automatic treble damages against any defendant convicted of a RICO predicate offense or of RICO itself. Some expressed fears, however, that miscreants would be able to "plea bargain" their way out of potential treble damage liability by agreeing to plead guilty to an offense that happened not to be one of the RICO predicate offenses. Quite frankly, not only did such a fear seem remote, but such a scenario suggested that RICO's primary function, which is often forgotten in this debate, to help law enforcement officials, would be well served, namely, by providing an additional weapon for convicting criminals by the government.

Nonetheless, in response to the concerns expressed, S.438 now provides that a plaintiff may pursue automatic treble damages against any defendant convicted of any felony arising out of the conduct on which the civil suit is based. In other words, if any prosecutor obtains felony pleas or convictions, all injured parties may initiate treble damage civil RICO suits against the defendants in those cases. So, for instance, to use a current example, if any person or institution pleads guilty to or is convicted of any felony in connection with a failed savings and loan, they will be subject to automatic treble damages under RICO by virtue of that plea or conviction -- assuming, of course, that the plaintiff can prove all the elements of a RICO case. Of course, S.438 provides that the FSLIC can continue to sue for automatic treble damages.

Under S.438's revised prior-criminal-conviction provision, it is necessary that the plea or conviction be of a felony. Because of the broad distinction in the law between felonies and misdemeanors, and the potential for mischief that could follow if a conviction for any minor misdemeanor could trigger automatic treble damage liability, the Coalition would strongly oppose including misdemeanor convictions in this provision. Nor is it necessary to include misdemeanors to address the fear of evasion through plea agreements, because federal prosecutors will not agree to a plea to a misdemeanor if they believe the crime to be of sufficient seriousness to warrant a felony conviction of some type. Thus, the requirement of a felony plea or conviction addresses the concern raised while avoiding opening up civil RICO once again to potential and unnecessary misuse.

The Purpose of RICO Reform Requires That Some Plaintiffs Sue For Single Damages Only.

In S.1523, even those plaintiffs who could not sue for automatic treble damages, or even for punitive damages of up to double actual damages, were permitted to seek, in addition to full actual damages, costs and attorneys' fees. This continued privilege to seek costs and attorneys' fees was inconsistent with the purposes and structure of the proposal. The notion underlying the single-damages category was that the type of cases that fell in that category, on the whole, represented the source of most of the misuse of the statute and for which, therefore, it was necessary to eliminate the incentives to use civil RICO in lieu of existing state and federal law remedies. Yet, permitting the plaintiff in those cases to continue to seek attorney's fees and costs meant that the incentive to misuse civil RICO still would exist, since most state and federal law remedies do not have attorneys' fees provisions. Therefore, S.438 eliminates this inconsistency. Under S.438, plaintiffs with cases that fall into the single damages category will still have civil RICO available if they need it, and will be able to recover their actual damages.

However, there will no longer be an irresistible incentive to find ways to use civil RICO in lieu of and to evade long-standing state law remedies and federal law regulatory systems.

Conclusion

S.438 will help correct the most egregious abuses of the RICO statute. It is a carefully-crafted compromise, the result of several years of hearings, study and work by members of both the Senate and House Judiciary Committees. Like all compromises it may not go as far as some would like, but its supporters believe this legislation represents a practical and workable solution to a significant and growing problem. The Coalition urges the Committee to give it your unanimous endorsement again, and to do so in a manner that will permit RICO finally to be reformed in the 101st Congress.

Coalition for RICO Reform

A Coalition Dedicated to the Reform of the Racketeer Influenced and Corrupt Organizations Act.

Philip A. Lacovara
Chairman

June 28, 1989

BY HAND

Senator Dennis DeConcini
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Re: Questions Concerning S. 438

Dear Senator DeConcini:

Thank you for your letter of June 13, 1989. I wish to express my thanks to you and to the other members of the Committee on the Judiciary for the opportunity to appear before you on June 7, 1989, to present the views of the Business/Labor Coalition for Civil RICO Reform.

I enclose my responses to the supplemental questions you sent me on June 13. I hope that you and the other members of the Committee find my answers to be fully responsive and useful in your deliberations on this important legislation. The members and representatives of the Coalition and I stand ready to provide any additional information that the Committee would like to receive.

Sincerely,

Philip A. Lacovara

Philip A. Lacovara
Chairman,
Business/Labor Coalition
for Civil RICO Reform

Enclosure

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June 28, 1989

RESPONSES OF PHILIP A. LACOVARA TO SUPPLEMENTAL QUESTIONS POSED BY THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, RELATING TO S. 438, THE CIVIL RICO REFORM ACT OF 1989

Questions Submitted by Senator DeConcini:

1. Professor Blakey disputes the assertion that the federal courts are being flooded with RICO claims, that the statistics demonstrate that there is no great problem. He also says that "the mere fact of RICO suits is not a matter to be decried or deplored" because "litigation itself is not an evil." Is Professor Blakey correct in disparaging the seriousness of the problem that RICO poses to the federal court dockets?

Response:

Professor Blakey and others point to the two to three thousand civil RICO filings identified by the Administrative Office of the U.S. Courts, compare them to the hundreds of thousands of federal cases, and declare that civil RICO does not pose a threat to federal court dockets. This sophistry ignores several critical facts.

First, as the Administrative Office itself admits, the method used to identify RICO suits results in significant undercounting. A plaintiff's attorney can check only one of dozens of boxes on the "civil cover sheet" that he files with a complaint to identify the nature of his case. Since civil RICO cases are by definition predicated on other offenses, there is usually another box that can be checked. In light of the widespread perception that many federal judges are hostile to civil RICO actions, it is not surprising that most plaintiffs' attorneys choose not to emphasize to the court that they are filing a "RICO case," and instead take advantage of the opportunity to check a different box.

Second, the overall rate of filing does not reveal variations from court to court. In larger metropolitan areas, in which the bar may tend to be more sophisticated and savvy about new methods of pleading cases for big damages, the rate of civil RICO cases is likely to be higher. In fact, one judge who did an informal survey of new cases on her docket in a major metropolitan area estimated that 15 percent of new filings included RICO claims.

Third, and most tellingly, the simplistic effort to calculate the number of civil RICO cases as a percentage of overall civil filings is misleading, as any candid observer would have to concede. Not all "cases" are fungible. Tens of thousands of federal court filings each year are social security cases and prisoner petitions, which generally do not command a great commitment of the court's resources. Other types of federal filings are similarly straightforward. By contrast, civil RICO claims generally arise in complex commercial cases that use up a disproportionate amount of the courts' resources. Not only are the factual allegations often complicated, but the statute itself invites a breadth of discovery not countenanced by other federal statutes.

It is this disproportionately substantial drain on the resources of the courts, not the raw number of filings as compared to the entire federal court docket, that has led the federal judiciary to call upon Congress for help. The official voice of the federal judiciary, the Judicial Conference of the United States, which seldom suggests alterations in substantive law to Congress, has twice called upon Congress to reform civil RICO substantially, because of the threat it poses to the rest of the federal courts' work. The Chief Justice of the United States, who seldom speaks to the merits of substantive legislation, recently reiterated the need for reform of the civil RICO statute because of the threat it poses to the federal courts' ability to manage their dockets and provide timely and thoughtful adjudication of other important claims.

The judges see federal litigation every day and see the impact of civil RICO on the federal courts. I submit that their judgment is worthy of Congress' serious attention and provides a compelling rejoinder to Professor Blakey's simplistic manipulation of unreliable and irrelevant statistics.

Professor Blakey's invocation of the aphorism that "litigation itself is not an evil" is another irrelevancy. Of course litigation itself is not necessarily an evil -- if the allegations are genuine and if there is no other, more efficient and more appropriate way to resolve the dispute. Unfortunately, the record shows that RICO litigation fails these critical tests. The Judicial Conference, the Chief Justice, and the numerous other federal judges who have warned of the threat civil RICO poses are not opposed to litigation. What they are concerned about is the federalization of claims traditionally and properly litigated in state courts, and the undermining of long-established federal remedies. These are the litigation problems that civil RICO has improperly -- and inadvertently -- created.

2. Critics of RICO reform have said that single transactions are not subject to civil RICO because the "pattern" requirement effectively prevents the use of civil RICO for isolated acts. Is that analysis of the application of civil RICO by the courts correct, especially in light of the Second Circuit's recent "pattern" decisions?

Response:

The opponents of civil RICO reform like to point to the "pattern" requirement as if it provides a bulwark against the abuse of the statute. Obviously, the federal judges do not see sufficient protection there.

And for good reason. While some judges have sought to use RICO's "pattern" requirement to dismiss RICO claims that have nothing to do with the racketeering problems that Congress intended to address, the case law had established many different standards, and just this week the Supreme Court addressed the issue in a manner that ensures that a good lawyer can plead his cases adequately.

In H.J. Inc. v. Northwestern Bell Telephone Co., No. 87-1252 (U.S., decided June 26, 1989), the Court rejected the interpretation of "pattern" that might have limited the statute's abuse. It similarly rejected interpretations that various amici had offered that would have allowed the courts to apply the statute more precisely to its intended targets -- professional criminals. Otherwise, the Court did little to build upon the current understanding of the term "pattern," except perhaps to limit the availability of RICO in instances were there as been a single action or short-term activity, even if there are multiple "victims".

While the Court, in explicating the "pattern" requirement, once again (as it had in the majority opinion in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985)) referred to the terms "relationship" and "continuity," it left such great flexibility in the application of those terms that its decision will not provide a tool for separating the wheat from the chaff in civil RICO litigation. As the concurring opinion of Justice Scalia noted, "the Court does little more than repromulgate those hints [that the Court had offered in the Sedima decision] as to what RICO means, though with the caveat that Congress intended that they be applied using a 'flexible approach.'" And the majority conceded as much, but once again, as it did in Sedima, it explained that the solution to the RICO quagmire lay with Congress, not the courts: "RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for this Court."

As the Seventh Circuit Court of Appeals noted, in one of the leading decisions on the "pattern" requirement, the requirement as interpreted by most courts, and now by the Supreme Court, at best requires a court to weigh many different facts, and thus is unlikely to provide an early end to inappropriate RICO litigation:

> We recognize that by adopting this factually-oriented standard, as opposed to a hard and fast set rule, the legal test is necessarily less than precise. One judge has even analogized this legal test to Justice Stewart's famous test for obscenity -- "I know it when I see it."

Morgan v. Bank of Waukegan, 804 F.2d 970, 977 (7th Cir. 1986).

The uncertainty about the application of the "pattern" requirement is probably inherent to any definition of the term, and a clever attorney will be able to plead adequately to meet the standard in most commercial cases. Business relationships, in particular, typically involve a number of steps or acts that take place over the period of time during which the relationship extends. Therefore, the circumstances surrounding a business relationship gone sour are likely to provide enough grist to the disappointed participant to satisfy any definition of "pattern." The problem is exacerbated, because any interpretation of "pattern" designed to limit the use of civil RICO will also limit the availability of the criminal provisions of RICO to prosecute its intended targets -- professional, hard-core criminals.

That is precisely the dilemma the Second Circuit Court of Appeals faced recently when confronted with two cases requiring the Court to interpret the "pattern" requirement -- one a criminal case involving three simultaneous murders, and the other a civil case involving a dispute over a condominium conversion. (These are the cases to which I believe your question refers.) I discuss these cases at some length in my written statement submitted to the Committee at the June 7 hearing. Let me just restate for present purposes the conclusion to which those two cases lead: The Second Circuit struggled with the inherent tension in the cases -- between a narrow test to filter out unwarranted civil claims and a broad test to reach professional criminals -- and finally concluded that -- given the limits on a Court's power to superimpose distinctions that Congress failed to make -- it is better to open the floodgates of civil RICO than to let convicted murderers go free. The court thus acknowledged that it was adopting an interpretation of "pattern" that realistically would not limit RICO's misuse in civil litigation.

In sum, the "pattern" requirement will not provide the limitations on the use of civil RICO necessary to end its misuse in ordinary commercial litigation. As the Seventh Circuit itself acknowledged in discussing its widely-adopted interpretation of "pattern:"

> Th[e] legal test . . . still gives civil RICO a broad scope, and may still permit so-called 'garden variety' fraud claims to be brought in federal court. . . . But as both this Circuit and the Supreme Court have noted, hostility to the extraordinary breadth of civil RICO is not a reason for the courts to restrict its scope. . . .
>
> It should be noted that Congress has recently considered narrowing the breadth of civil RICO. . . . Of course, if Congress should decide to narrow civil RICO, the courts will respect its restrictions.

Morgan v. Bank of Waukegan, supra, 804 F.2d at 977. Quite properly, the courts, including now once again the Supreme Court, have recognized that Congress bears the responsibility for repairing this statute and Congress cannot expect the courts to invent solutions to a statutory problem that Congress created.

3. Professor Blakey asserts that the label "racketeer" that attaches to defendants in civil RICO suits make defendants less likely, not more likely, to settle suits because they want to fight to the end to clear their names. Is Professor Blakey's reasoning consistent with your observations of the dynamics of civil RICO litigation?

Response:

No. As far as I can tell, Professor Blakey's thesis on this point is shared by no one who knows anything about actual RICO litigation. Professor Blakey moreover, asserts his conclusion, offering no real support. The fact is that plaintiffs' lawyers continue to use RICO charges whenever they can because they know the racketeering label gives them enormous leverage. Defendants and their counsel know that they are right. Justice Marshall accurately summarized this experience in his dissenting opinion in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985), when he wrote:

> Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive

> purposes, giving rise to the very evils that it was designed to combat.

473 U.S. at 506.

While it may anger some people to be accused of being a "racketeer," and make them want to fight back, for professionals, whose careers depend on their reputations in the community, the publicity surrounding such a charge can be severely damaging whether or not they ultimately would be vindicated in a trial years later. Mr. Harrison, the bank executive, spoke eloquently to this very point in his testimony to this Committee at the June 7 hearing, when he explained the damage done to his bank's standing in the community and its ability to conduct its business caused by two civil RICO suits, even though the bank ultimately prevailed in one case and expects to do so in the other.

For many RICO defendants, under those circumstances, the rational response is to pay the "extortion," however angry they may be that they have been put in that position unfairly. While no one ever likes to be shaken down, the victim does what is necessary to protect himself: it is on that rational reaction that the extortionist always counts.

Professor Blakey again offers a sophistic gambit when he addresses Justice Marshall's observation in his Sedima opinion that a defendant may well settle a civil

RICO case with "no merit" because he faces "ruinous exposure." Professor Blakey objects that, if the suit has no merit, then the risk of liability multiplied by the potential damages must always be the same -- zero -- whether the potential damages are actual or treble.

However, Professor Blakey's clever dissection of Justice Marshall's statement misses the point. If there is any chance that the defendant will lose, then the trebling of potential damages does alter the calculation and thus increases the settlement value of the case for the plaintiff. In fact, except in the truly frivolous case, no matter how strong a defendant thinks his position is, there is always some chance of losing at trial, particularly in a jury case. Moreover, Professor Blakey's discussion assumes that the only "ruinous exposure" is from the potential judgment; he ignores the damage to the defendant's reputation and livelihood that the litigation itself causes, to which Mr. Harrison testified.

4. In the area of securities fraud, opponents of RICO reform rely on the argument that, in their opinion, the securities laws are inadequate to deter fraud. Isn't this concern more properly addressed in the securities laws? It seems to me that the argument is that we should have a pervasive Federal fraud statute that is consistently abused and used to coerce and harass defendants, because securities plaintiffs' attorneys believe that securities laws are inadequate to address securities fraud. How would you go about addressing securities fraud?

Response:

Your point is well taken. The underlying problem with the civil RICO statute is that, with little rhyme or reason, it allows plaintiffs to supersede direct statutory and common-law remedies long-established under both state and federal law. Nowhere is the problem more prevalent than in securities litigation. As I explained in my written testimony, I believe that the reason for the widespread use of civil RICO in securities litigation can be traced to the nature of the securities law plaintiffs' bar and the nature of securities transactions. But in any event, the figures consistently reveal that somewhere around forty percent of all civil RICO claims arise out of securities transactions. As a result, as Justice Marshall again warned in his dissenting opinion in the Sedima case, civil RICO "virtually eliminates decades of legislative and judicial development of private civil remedies under the federal securities laws." 473 U.S. at 505.

Ironically, of course, regulation of the securities markets has been a subject of enormous Congressional concern and careful legislative action for more than fifty years. In taking that action, Congress has carefully examined the particular problem with which it was concerned, balanced the competing considerations, and then crafted legislation designed to address the concern while protecting the vitality of the capital markets, which is essential to the economic well-being of this nation. Civil RICO undoes all that careful work.

In the past, Congress has altered the system of securities regulation as times and circumstances justified such alterations. It is undoubtedly the case that the current system is not perfect, and that further refinements can and will be justified in the future. But if there is a case for altering that system, the way for Congress to address that case is to study the specific problem directly and to legislate directly to solve the problem, not to cede the field to the blunderbuss, ill-defined, and untailored statutory provisions of civil RICO. Congress's specific attention to the problem of insider trading illustrates this point.

I respectfully refer the Committee to my written statement that I submitted at the June 7 hearing for further discussion of this issue.

Question Submitted by Senator Kennedy:

You testified before the House Judiciary Committee in 1979 in opposition to retroactive application of legislation that would have overruled the Supreme Court's decision in Illinois Brick v. Illinois, 431 U.S. 720 (1977). The lengthy rationale you presented for that view relied on James Madison's comments set forth in Federalist No. 44 and subsequent due process decisions of the U.S. Supreme Court. How do you distinguish the factors weighing against retroactive application in the Illinois Brick situation with those presented by RICO reform legislation and how do you distinguish the cases and legal authorities relied upon in your earlier testimony?

Response:

The distinction between the two pieces of legislation is fundamental: The proposed Illinois Brick legislation would have created new liability and eliminated some causes of action entirely; it was obviously offensive to impose liability retroactively and to wipe out pending claims. By contrast, the RICO bill neither creates new cases of action in pending cases nor eliminates any pending RICO cause of action. Rather, it is designed to provide relief from a treble-damage remedy in cases in which the courts, commentators, and most Members of Congress recognize Congress never intended to permit it in the first place. It is both sensible and fair to make this relief available in the pending cases that illustrate the need for reform, especially under the carefully-limited and judicially-monitored conditions set out in the RICO bill.

Let me expand on these important distinctions. As I noted throughout my testimony in 1979, the legislation that the Judiciary Committee then had under consideration, H.R. 2060, would have made two major changes in the substantive provisions of the antitrust laws. First, it would have expanded enormously the exposure of a potential defendant, by creating (1) new causes of action for indirect purchasers of products, (2) new liability for subsequent markups and for consequential damages at all levels of the chain of sale, and (3) the spectre of overlapping treble-damage liability to the series of purchasers through whose hands the defendant's product passed.

The bill failed to assure that a defendant could show in a suit by a direct purchaser that the claimant had "passed on" the increased cost arising from the alleged antitrust violation to subsequent purchasers, yet those subsequent purchasers would be authorized to bring their own suit for damages arising from the higher costs that were allegedly "passed on." Thus, for a single sale of an allegedly overcharged product, the bill would have created new liability for duplicative -- or worse -- treble damage claims from purchasers at each level of the distribution system.

Second, the bill would have made the "pass on" defense available at the discretion of the court, thereby raising the possibility that certain direct purchaser plaintiffs would be divested of claims that accrued under the law in effect when they purchased the product.

Thus, as I said at that time, the application of such a change in the substantive law to conduct that had already occurred would have had two improper effects:

> Not only would it enlarge the class of potential plaintiffs to include indirect purchasers who never dealt with the defendant, and have had no legal claims against him, but it would also make the direct purchaser's entitlement to recoup the full amount of the overcharge he paid to the defendant totally dependent on the discretion of the court.

It was this "creation of wholly new liabilities" and "destruction of existing claims" that I argued raised serious constitutional questions.

Those themes echoed throughout my 1979 testimony. I repeatedly referred to --

-- the fact that the statute would create "whole new tiers of liability not imposed by current law,"

-- the fact that "a person should be able to assess his conduct with reasonable knowledge of its legal consequences,"

-- the fact that some plaintiffs might be "totally divested of their causes of action," because "[d]irect purchaser plaintiffs who would become subject to 'pass on' defenses in pending cases risk losing viable causes of action," while the legislation "would also create whole new classes of plaintiffs . . who could sue," and

-- the added threat of "multiple liability if direct and indirect purchasers pursued claims," which would "retroactively enlarge the quantum of liability that was foreseeable and that attached when the antitrust violation occurred."

It was in this context that I analyzed the application of constitutional doctrine to the proposed retroactive effect of the legislation. The impact of the legislation led to my conclusion that Supreme Court precedent required that the legislation apply only to future conduct, in order to "'prevent[] the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed.' Union Pacific R.R. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913)." I testified also that those same aspects of the proposed legislation raised serious questions in light of the precedent applying the Contract Clause, in which the Supreme Court had turned aside statutes that created "obligations exceeding those voluntarily agreed upon by the parties."

The proposal's creation of new liability and its elimination of existing claims also raised questions under the constitutional test of Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), where the Supreme Court described the issues as "whether the burdens imposed were foreseeable and whether any actions were taken in reliance on the law as it then existed." I pointed out the importance under the test of Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), of the fact that "[d]irect purchasers may similarly be deprived of their day in court if, in the midst of pending litigation, a defendant is permitted to assert a 'pass on' defense that may wholly nullify the plaintiff's claim." And I cited the Committee Staff's own memorandum worrying that "a bill that authorizes consequential damages for indirect purchasers would increase the substantive liability of violators and could 'not constitutionally be retroactive,'" and that the "spectre of multiple liability" for a single violation of law was "'clearly an unacceptable result, and possibly unconstitutional.'"

It is in this same context in which James Madison, in The Federalist No. 44, decried "the fluctuating policy which has directed the public councils," and made the other statements I cited in my 1979 testimony and you cite in your question. He was writing about "Bills of attainder, ex post facto laws, and laws impairing the obligations of contract," which he stated "are contrary to the first principles of the social contract and to every principle of sound legislation." These types of "retroactive" legislation share the characteristics that I emphasized in the rest of my testimony: the threat of creating new or substantially different liability for past acts, or the threat of undoing obligations agreed to by private parties in the context of commercial dealings.

I also raised other constitutional concerns implicated by legislative proposals designed to overturn the decisions in Illinois Brick, and, to some extent, Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968). I noted the importance to the analysis under the Chevron standard of the "previously unforeseen complexities" that would be introduced into pending cases by the legislation's "effort to split pro rata portions of an overcharge among several levels of distribution."

I also explained why there seemed to be no substantial justification for retroactively reallocating the right to bring antitrust treble-damage cases. In objecting to the "balancing test" that the Justice Department had suggested to justify that fundamental change, I observed that,

> [s]ince by definition any past violations have already occurred, an alleged increase in deterrence for the future provides no basis for retroactivity. Nor is there a compelling justification for subordinating the interests and expectations of plaintiffs and defendants in pending litigation to the hopes of indirect purchasers.

Finally, I argued that, aside from constitutional questions, there were substantial policy reasons for making the proposed legislation prospective only. I focused principally upon the disruption of cases in which verdicts and settlements had been reached, the reopening and reworking of pleadings, the creation of new discovery issues and the complication of trials that would be necessary in order to take account of the newly-created defense and the newly-enfranchised plaintiffs. I concluded that the "speculative gain in reallocating antitrust recoveries is simply not worth the chaos that would result from the ill-advised retroactivity provision and the burdens it would place on the courts and parties."

In dramatic contrast to the objectionable features of retroactively applying the Illinois Brick bill, the effective date provision of the RICO reform bill presents none of the concerns that underlay my 1979 testimony. The only provision of S. 438 that would apply to pending cases is the one that limit awards to actual damages. Therefore, unlike the Illinois Brick bill, this bill would not create new liability for past conduct or authorize new categories of lawsuits based on past conduct.

Moreover, unlike the 1979 proposed legislation, S. 438 does not threaten to take away any cause of action from any civil RICO plaintiff -- past, current, or future. Any person who has a cause of action under the current provisions of civil RICO would have one after Congress enacts S. 438, and that person would be able to collect at least full actual damages. Plaintiffs in pending suits would continue to have the right to receive full damages, and in addition the bill would make them whole for any "investment" they might have made in the lawsuit by awarding them attorney's fees and litigation costs as well.

Indeed, S. 438 goes even further to ameliorate even its limited impact on pending suits, eliminating other of the concerns I mentioned in 1979. S. 438 expressly states that cases in which there have been verdicts or settlements will be unaffected. By limiting the potential impact on pending cases to the claim for a windfall damage award, there is no threat of "reopening or reworking" pleadings, discovery, or trials in pending suits. The cases will proceed exactly as they would have without the legislation; the court simply will not triple any subsequent award.

Furthermore, the effective date provision in S. 438 goes even further than constitutional law requires by providing that a court may disregard the new law and permit treble damages, even in the limited category of pending cases to which S. 438's damages provisions would otherwise apply, if the court finds that it would be "clearly unjust" not to allow treble damages. In contrast, under the constitutional standard that the Supreme Court established in Bradley v. Richmond School Board, 416 U.S. 696 (1974), statutory changes apply to pending cases unless the plaintiff meets the significantly higher standard of "manifest injustice."

At the same time, my comment criticizing the balancing test that the Justice Department proposed in 1979 to justify retroactivity supports S. 438's effective date provision: Since pending cases necessarily address past conduct, limiting windfall awards in pending cases cannot have a negative impact on the deterrent effect of the statute. To the contrary, the very premise of S. 438 is that treble damages are inappropriate in certain classes of civil RICO cases -- those in which the "detrebling" will occur -- and therefore applying that judgment at least to some pending cases that fit the bill will further the purposes of the statute.

Thus, in conclusion, S. 438 would not "retroactively enlarge the quantum of liability that was foreseeable" when the conduct occurred. Nor would it "totally divest[]" any actual plaintiffs of "their causes of action." And it would not fundamentally change the nature of the issues being litigated in pending cases. Therefore, it does not raise the constitutional and policy problems that I identified in examining the 1979 proposal or that concerned James Madison in The Federalist No. 44.

Questions Submitted by Senator Thurmond:

1. Are you aware of national efforts to amend existing RICO laws in the individual states?

Response:

I am not aware of any past or current coordinated national effort to amend or repeal any of the existing so-called state "mini-RICO" statutes. Nor am I aware of any effort currently underway by any of the individual constituents members of the Coalition or any other group or association to amend or repeal those statutes on a nationwide basis. Those state statutes vary considerably and often raise issues that differ substantially from the issues that the federal RICO statute raises.

2. Because of the potential high cost of defending a RICO action, do you support awarding attorneys' fees to a defendant who can show that he is the subject of a frivolous RICO claim?

Response:

Versions of proposed civil RICO reform legislation that the Business/Labor Coalition For Civil RICO Reform has supported during past sessions of Congress have, in fact, contained provisions along the line your question suggests. The Coalition would not oppose including such a provision in S. 438. I would point out, however, that a provision awarding attorney's fees to a defendant who has been subjected to a "frivolous" civil RICO suit would not ameliorate the current abuse of the civil RICO statute.

The problem lies in the meaning ordinarily attributed to the term "frivolous" in this setting. It is understood as applying only when the plaintiff has made an allegation that could not fit within the terms of the statute. The problem with civil RICO is that its broad language permits plaintiffs to bring a wide variety of inappropriate litigation that arguably falls within the reach of the statutory language and thus is not "frivolous" as that term is traditionally used in legislation and in the courts.

That is the reason why civil RICO defendants find little relief from the misuse of civil RICO in Rule 11 of the Federal Rules of Civil Procedure, which already makes available to all civil defendants in federal court sanctions against plaintiffs who bring "frivolous" suits. Because of the ease with which plaintiffs can characterize basic commercial disputes as civil RICO claims, courts have been, and, I believe, will continue to be, very reluctant to impose Rule 11 sanctions. Quite simply, almost anything could be alleged as a civil RICO claim. Thus, simply adding an explicit provision in RICO to penalize "frivolous" claims is not likely to change this practice.

In addressing the courts' interpretation of just one provision of the RICO statute -- the "pattern" requirement -- Justice Scalia noted in his concurring opinion in the recent H.J. Inc. case that the district and circuit courts have produced "the widest and most persistent circuit split on an issue of federal law in recent memory." The court decisions relating to other of civil RICO's broad provisions reflect this same wide divergence in interpretation, and therefore further undermine any effort to define what constitutes a legally "frivolous" civil RICO suit.

3. Do you feel that under the current RICO statute, federal judges have enough flexibility to summarily dismiss RICO claims they feel are abusive of Congressional intent?

Response:

No. To the contrary, federal judges repeatedly have complained that RICO's broad language requires them to permit claims to go forward even though the judges recognize that Congress never intended RICO to be used in the case before them.

The Supreme Court's decision this week in H.J. v. Northwestern Bell Telephone Co., No. 87-1252 (U.S., decided June 26, 1989), epitomizes the dilemma faced by the courts and by civil RICO defendants. Although the

Supreme Court's ruling in H.J. Inc. did eliminate those few civil RICO cases in which the plaintiff alleges a pattern of racketeering activity based on nothing more than two wholly unrelated and virtually simultaneous "predicate acts," the Supreme Court stated that in virtually all other situations, "[w]hether the predicates proved established a threat of continued racketeering activities [sufficient to meet the "pattern" requirement] depends on the specific facts of each case." Thus, in most civil RICO cases, whether the plaintiff has pleaded and can prove a pattern of racketeering activity is likely to be a question of fact for the jury's determination.

As a result of the Court's decision, Federal district court judges will be able to dismiss even fewer civil RICO cases for failing the requirement of pleading a "pattern" of racketeering activity. The result will probably stimulate more civil RICO filings and more cases avoiding dismissal, and thus more opportunities for plaintiffs to use the threat of trebled damages and the smear of a "racketeering" charge to extort settlements from defendants.

Federal judges feel they cannot do anything to stop the misuse of civil RICO because their hands are tied by RICO's broad language. As the Supreme Court stated in the H.J. Inc. decision: "RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for this Court." At least in its private civil remedial provisions, RICO is a poorly drafted statute with disasterous results. Therefore, on behalf of the Business/Labor Coalition, I again urge Congress to act where the courts cannot to remedy that disaster, by reforming the statute.

Senator DECONCINI. Mr. Lacovara, thank you very much.

Several witnesses have said that existing remedies for bringing meritless and frivolous lawsuits are adequate to address any problem civil RICO might create. Do provisions in the law such as rule 11 address the problems you see caused by abusive civil RICO suits?

Mr. LACOVARA. No. As President Raven of the ABA mentioned, Mr. Chairman, the problem is not the frivolous suits that are just where someone invents the facts. The problem is inherent in this statute.

The statute, as written, is overly broad and permits lawyers—indeed, as some witnesses have said, obliges lawyers ethically to take advantage of the overbreadth of the statute to bring RICO counts that don't deserve to be in Federal court because in 1970 Congress had not anticipated, when it tacked on the civil remedy, that there would be no discretion of the type prosecutors are using under the criminal statute to separate wheat from chaff. So rule 11 is not an adequate way of dealing with the over-use.

Senator DECONCINI. Is it true that abusive or frivolous claims are not subject to rule 11? Is that a fair statement?

Mr. LACOVARA. Well, claims that are not frivolous are not subject to rule 11, and rule 11 defines what it means by frivolous. It means having no basis in fact or no basis in existing law or the argument for extension of existing law.

Senator DECONCINI. So it isn't difficult to draw a complaint that would address that and still be considered groundless as far as RICO, and you know of such cases?

Mr. LACOVARA. Yes, sir, I do. As many of the witnesses have said, many of the cases that go forward—the one Mr. Feinberg mentioned is a classic example, but only the most dramatic example—come within the four corners of RICO, but, as Judge Weinstein recognized, is not the kind of case that ought to be in Federal court.

But I doubt that he would, even after dismissing the case, find that the lawyers are subject to sanction under rule 11 for having brought it because the statute was broad enough to allow them to give it a try.

Senator DECONCINI. Mr. Harrison's case would be a good example, also.

Mr. LACOVARA. Absolutely; same answer, Mr. Chairman.

Senator DECONCINI. Mr. Harrison, I am concerned about the fear expressed in your statement that the anticipation of future RICO action against your bank by borrowers has become a significant factor in your institution's lending policy.

Would you expand on that concern?

Mr. J. HARRISON. Mr. Chairman, again, looking at our current policy and our historic policy, we have tried to in all efforts support the areas. And, again, our areas are small business areas. My statement goes into the fact that we are asked to supply capital to couple with dreams or ideas, and we have done that.

In being stung both under the RICO allegations as well as the current environment of lender liability, we have within the last 6 months reviewed our philosophy, our statement of philosophy as to how aggressively we are going to lend and to what types of businesses we are going to supply the capital to go with the dreams.

And the impact—aside from the emotional impact on a community bank of having those type allegations made, the economic impact—the one case I shared, the direct cost was in excess of $350,000. That case was one that was run through about a 4½-year timeframe through discovery and through building of defense before it was dismissed. The economic cost was incurred, as well as the damage to our image.

We think that if civil RICO is going to continue to be able to be used by a borrower who is unable to repay in an attack—what we consider a brutal or hostile attack against a financial institution—then we are going to curb the opportunities for that to occur, and the only way we know to do that is to limit our willingness to lend, and that is of great importance because we, of course, in turn, depend upon the successes of small business, which is the economic nucleus of every area that we operate a bank in.

Senator DeConcini. So it affects the potential borrower as well as the banks?

Mr. J. Harrison. It hits both of us.

Senator DeConcini. Gentlemen, I have a number of questions, and others may also. I am going to ask if you would be so kind as to respond to them. We will submit them for answer, but due to time constraints I am going to leave it at that.

[The questions and responses follow:]

RESPONSE FROM JIM HARRISON

QUESTIONS FROM THE PANEL MEMBERS

1. Are any of you aware of national efforts to amend existing RICO laws in the individual states?

NO

2. Because of the potential high costs of defending a RICO action, do any of you support awarding attorneys' fees to a defendant who can show that he is the subject of a frivolous RICO claim?

YES

3. Do you feel that under the current RICO statute, federal judges have enough flexibility to summarily dismiss RICO claims they feel are abusive of Congressional intent?

Our experience has shown that judges are most uncomfortable dealing expeditiously with RICO charges. Further, even the U.S. Supreme Court has found difficulty in its attempt to capture Congressional intent.

Senator DECONCINI. Thank you very much for your testimony this morning. It has been very helpful.

Our next panel will be Michael Waldman, Public Citizen's Congress Watch; Mr. Mark Reinhardt, Reinhardt and Anderson; Mr. Robert Blakey, O'Neill Professor of Law, Notre Dame Law School; and Mr. James Long, commissioner of insurance, State of North Carolina.

Gentlemen, your full statements will be printed in the record, and due to the time constraints, I would ask that you summarize them. We will start with you, Mr. Waldman.

STATEMENT OF A PANEL CONSISTING OF MICHAEL WALDMAN, LEGISLATIVE DIRECTOR, PUBLIC CITIZEN'S CONGRESS WATCH, ON BEHALF OF PUBLIC CITIZEN AND THE U.S. PUBLIC INTEREST RESEARCH GROUP, WASHINGTON, DC; MARK REINHARDT, REINHARDT & ANDERSON, SAINT PAUL, MN; G. ROBERT BLAKEY, WILLIAM J. AND DOROTHY O'NEILL PROFESSOR OF LAW, UNIVERSITY OF NOTRE DAME SCHOOL OF LAW, NOTRE DAME, IN; AND JAMES LONG, COMMISSIONER OF INSURANCE, STATE OF NORTH CAROLINA, ON BEHALF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, WASHINGTON, DC

Mr. WALDMAN. Thank you, Senator DeConcini, for the opportunity to testify on this legislation. Public Citizen is a consumer organization representing consumers from around the country.

Senator DECONCINI. Pull the microphone a little closer to you, please.

Mr. WALDMAN. We are also testifying on behalf of the U.S. Public Interest Research Group, which is the national association of State PIRG's.

Mr. Chairman, this Nation is suffering through a white collar crimewave. White collar crime, every day we see in the headlines, wreaking havoc on the marketplace, on the trust that consumers have in the marketplace and on important economic institutions.

The savings and loan crisis, for example, which is now estimated to cost taxpayers and consumers upwards of $300 billion over 30 years, is in large measure due to fraud and criminal activity and insider abuse at savings and loan institutions.

The General Accounting Office, for example, examined 26 thrifts in Texas which had failed and found some form of improper activity at 26 of those thrifts. On Wall Street for the past several years, the obvious evidence of illegality continues to mount, Drexel, Burnham, Lambert, one of the most prominent investment houses in the country, pleading guilty to several charges of criminal activity; Michael Milken, one of the most prominent financiers in the country, currently awaiting trial for allegations of stealing hundreds of millions of dollars—commodities fraud, telemarketing fraud. The list is endless, as we all agree.

And this does not just violate social esthetics or some concern with ethics. It costs consumers real money. The Justice Department estimated that in 1986 white collar crime that year alone cost the economy $200 billion. That is more than the Federal budget deficit.

And because of inadequate prosecutorial resources, as has been said earlier, there is a need for strong tools for private attorneys general. One example shows why private enforcement is necessary. The Securities and Exchange Commission is so swamped with the amount of fraud it has to contend with that it declined to prosecute fraud arising out of the Washington public power system bankruptcy because it simply couldn't handle two big cases at once. That shows the need for strong tools for private victims.

And civil RICO is one of the most important tools currently available to consumers and other victims of white collar crime. It has been used by consumers in suits against Ivan Boesky, savings and loan fraud, land fraud, home improvement scams, the whole range of fraud that currently preys on consumers in the marketplace.

We regard it as extremely important that for consumers and other victims, this be maintained in the strongest possible form.

I want to just address, and I am sure other people, especially Professor Blakey, will similarly address the issue of whether there is a flood. Fewer than one-half of 1 percent of Federal court filings last year, according to the administrative office of the courts, were civil RICO cases. That is a trickle; that is not a flood.

Even if that is an under-count—even if the real number is 5 times, that is only 2.5 percent. If it is 10 times, it is only 5 percent. We suggest that does not warrant the wholesale revision of the law, scaling back its remedies that this legislation entails.

Turning to the specifics of your legislation, we believe that the legislation, unfortunately, dilutes deterrence. We believe, really, that rather than reforming civil RICO, it effectively eviscerates it.

The statutory scheme that you have chosen to adopt, that this legislation adopts, takes those cases where victims can prove a pattern of criminal fraud or other criminal acts through an enterprise and cuts back the damages by two-thirds.

I would like to point out that many of the cases that the previous witnesses have suggested are abusive are either not touched at all by this legislation or can still be brought.

For example, the second case suggested by the gentleman from the bank who was here earlier—he said that the actual damages were $100 million in that suit. That case could still be brought, and I would suggest that he would continue to contest that case in court.

Similarly, the Texas Air lawsuit against the machinists union, which we would——

Senator DeConcini. Let me interrupt you just on that matter, and I think you raise a good point. The case probably would still be brought, but is that justification for that bank to face treble damages?

Mr. Waldman. Not necessarily, sir, but it would not be justification for cutting back treble damages in those cases, without knowing the details of that case, of course. What we are suggesting is that the proper approach would be to narrow civil RICO and clarify civil RICO without cutting back the damages, so that if you can continue to——

Senator DeConcini. Do you have some specifics that you will submit to us?

Mr. **Waldman**. Yes, absolutely.

Senator **DeConcini**. Okay.

Mr. **Waldman**. And I will get to several of them in a second, Senator.

Senator **DeConcini**. Sorry. Go ahead.

Mr. **Waldman**. Let me just say that the case against the machinists union as well, which we would agree is probably very much an abusive case—the actual damages sought by Frank Lorenzo were $1.5 billion under the current wording of civil RICO. That would, again, continue to be contested by the union. So we do not believe that your legislation deals with the truly abusive cases.

What it does do is deal with damages when they can be proven. It cuts treble damages down to actual damages in most cases, and in most cases we, of course, hear about legitimate businesses. A lot of businesses that carry on legitimate business act illegitimately.

E.F. Hutton, for example, is certainly a prominent and respected business, but it pleaded guilty to many, many criminal counts 2 years ago in financial schemes. In all those kinds of cases where the victim was another business or a natural person other than a consumer, those are cut to actual damages and no attorneys' fees.

I would like to also point out that the consumer suits provision—and we appreciate the effort made to attempt to give consumers punitive damages, something more than actual damages. We regard that, unfortunately, as basically a phantom remedy.

We think that consumers have to jump through so many hoops to seek these punitive damages that, effectively, it is an actual damage statute. Senator, the consumers, to receive those punitive damages, will have to go through a second trial. They will have to prove them by clear and convincing evidence rather than the preponderance of the evidence standard met for proving the case-in-chief.

And, as has been discussed earlier, the "consciously malicious" language—it is not quite clear what that means, but it certainly would signal to a judge that whatever it is, it is something a lot higher than already having to prove a pattern of criminal acts.

In our estimation, consumers, facing the cost and complexity of civil RICO litigation, facing the difficulty to get an attorney to press even legitimate suits, will look at this provision and realize that they have no punitive damages available.

We also strongly object to the specific exemptions for securities and commodities fraud. We can think of no two industries less deserving of special protection in this day and age. We object, as several other witnesses will, to the provisions which cut damages retroactively to pending cases, and we object to several other provisions in it.

As you have asked, we absolutely agreed that some reform of civil RICO is either not harmful or even necessary. We would simply suggest that those reforms continue to allow people who can prove a real case where they have been defrauded to receive treble damages.

For example, we agree, change the name. People shouldn't be smeared just by being sued. No one disagrees with that.

Senator **DeConcini**. You say change the name?

Mr. WALDMAN. Change the name from "racketeering"; delete it. We have no problem with that.

As for the issue of frivolous suits, we believe there are some sanctions, and one beyond rule 11 which has been used. For example, your legislation requires particularity of pleadings, and there are other ways to require greater particularity of pleadings.

Well, by introducing that element, you now have something where if a plaintiff's attorney does not meet or a plaintiff doesn't meet that, they are more open to sanctions. We would conceivably suggest, if the Congress deems it appropriate, either looking at the pattern definition—the Supreme Court may be doing that—or looking at some of the predicate acts, such as mail and wire fraud, which are those most used in the cases that some people say are legitimate commercial disputes.

These types of things which narrow civil RICO without cutting back its reach would most protect consumers and others in the marketplace against the epidemic of white collar crime.

This is a time, Mr. Chairman, when white collar crime laws need to be strengthened, not weakened, and we strongly urge this committee and the Congress not to take steps that would deprive victims of their rights in court.

Senator DECONCINI. Thank you, Mr. Waldman. Let me ask you this, in the area of savings and loans, if the consumer or the depositor is insured, and let us say there is a criminal fraud there, isn't the public interest served by the fact that the depositor is insured by the Federal Government and is going to recoup his or her full payment, and the remedy is still there, and properly so, is it not, for the Government to bring the criminal case?

Why should the individual depositor also have a right to bring a criminal case when that is really the duty of the prosecutor?

Mr. WALDMAN. There are several answers to that question, Mr. Chairman. First of all, current prosecutorial resources for the Government are absolutely inadequate to the task of dealing with the epidemic of fraud in the savings and loan industry.

President Bush's request for $50 million for new prosecutors and new resources is simply——

Senator DECONCINI. And that is in legislation that passed the Senate, just for the record.

Mr. WALDMAN. Yes, it is, but it won't kick in in terms of its effectiveness of hiring people and getting investigations underway for quite some time. Here, again, private attorneys general are necessary.

Second of all, your legislation adversely affects the ability of regulatory agencies to use civil RICO, which they have to date been using, to combat the fraud in these areas. Your provision providing treble damages for Government entities does not, depending on how you read the law—-but many people believe and we believe it probably does not enable the Federal Deposit Insurance Corporation to use civil RICO and receive Government damages when it is stepping in as a subrogee of a failed savings and loan institution which has failed because of fraud.

We would suggest that one revision that your legislation should consider is to enable the regulatory agencies that go after S&L fraud to receive full governmental damages when they do so.

The final issue is whether consumers themselves should be able to use civil RICO and other laws, and we would say the answer is yes. The deposit insurance system insures, first of all, only up to $100,000. There may be consumers who have all their money in one institution. It doesn't mean they are necessarily rich, but it does mean that they may not reach their full——

Senator DeConcini. Where do you draw the line on this theory of private prosecutors? If the public is protected through the regulatory insurance agency up to some fund, aren't we just talking about private fraud prosecutors and then extending it to other crimes where maybe you don't need county attorneys or district attorneys any longer to bring criminal cases? Just let the individual say, I think you have defrauded me or you have trespassed on my property, so I will bring a criminal offense against you.

I see your point more in the area of noninsurance for a security fraud problem because the consumer is not going to get anything there.

If somebody doesn't go after it, the consumer isn't going to get any reimbursement. I just find it a little difficult to see why you have to invite a citizen to be a prosecutor. That is why we have prosecutors.

Mr. Waldman. I have a specific response to the S&L issue and a general response.

Senator DeConcini. Yes.

Mr. Waldman. The specific response is that, sadly, I don't think the past several years have shown the effectiveness of relying on the regulatory agencies and public prosecutors to deter or punish fraud in the S&L industry. Taxpayers are being faced with the prospect of a $300 billion tab because, in large measure, these current protections have been inadequate. So I think that in the S&L area, we need more both in public and in private enforcement.

And the second issue, broadly, is that we are in our judicial system rely both on public prosecutors and on private attorneys general. We can't expect prosecutors to do everything. That is especially true with white collar crime, which is frequently difficult to detect and arduous to prove. It doesn't mean it isn't happening.

Senator DeConcini. Thank you.

[The prepared statement of Mr. Waldman and response to questions follow:]

STATEMENT OF

MICHAEL WALDMAN,
LEGISLATIVE DIRECTOR,
PUBLIC CITIZEN'S CONGRESS WATCH

on behalf of

PUBLIC CITIZEN

U.S. PUBLIC INTEREST RESEARCH GROUP

on

S. 438

LEGISLATION AMENDING THE CIVIL PROVISIONS OF THE
RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO) LAW

before the

COMMITTEE ON THE JUDICIARY,
UNITED STATES SENATE

June 7, 1989

INTRODUCTION

Mr. Chairman, distinguished members of the Committee:

Public Citizen[*] and the U.S. Public Interest Research Group[**] appreciate the opportunity today to discuss proposals to alter civil remedies available under the Racketeer-Influenced and Corrupt Organizations (RICO) law.

Civil RICO is an important tool in the fight against rampant white-collar crime, and now is no time to weaken it. S. 438 takes the wrong approach to revision of RICO by reducing wholesale the availability of multiple damages, by creating a special industry exemption for the securities and commodities industries, and by applying its provisions retroactively. This legislation does not "reform" civil RICO; it guts it. The plan's effect would be to slash by two-thirds damages in those cases where plaintiffs can prove a genuine pattern of unlawful acts. Instead, we would urge the committee to adopt an alternative approach -- one that narrows and clarifies RICO without shortening its reach.

I. RICO REFORM: WHAT'S AT STAKE

This nation is suffering through a white-collar crime wave. Consider the series of financial muggings and computerized stickups from the past year alone:

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[*] Public Citizen is a nonprofit consumer and environmental organization founded by Ralph Nader in 1971. Congress Watch is the legislative advocacy arm of Public Citizen.

[**] The U.S. Public Interest Research Group (U.S. PIRG) is the national lobbying office for state PIRGs around the country. PIRGs are nonprofit, nonpartisan consumer advocacy organizations.

- The ongoing savings and loan collapse, it is widely acknowledged, is largely due to pervasive fraud and illegality in the thrift industry. The General Accounting Office (GAO) went so far as to call white-collar crime the major cause of S&L insolvency. Of 26 insolvent Texas thrifts studied, the GAO found insider abuse, fraud or criminality in 26 institutions -- literally every one. Similarly, the Federal Deposit Insurance Corporation has estimated that 70 percent of S&L insolvencies involved insider abuse. Federal regulators have sued or plan to sue most of the Big Eight accounting firms to recoup funds lost when many of these S&Ls collapsed. Taxpayers and consumers, of course, are being asked to foot the bill: current estimates of the cost of the bailout are $nearly 300 billion over three decades.

- Wall Street continues to be rocked by allegations or confessions of criminality. Two and a half years since financier Ivan Boesky pleaded guilty to stock fraud and agreed to pay fines totalling $100 million, evidence continues to mount that the securities industry -- and the takeover game in particular -- have been permeated with illegality. Most spectacularly, Drexel Burnham Lambert has pleaded guilty to stock fraud costing investors and the market hundreds of millions of dollars. Now Michael Milken, head of Drexel's junk bond operation, awaits trial on racketeering charges. In the words of Drexel chronicler Connie Bruck, in her book, The Predators' Ball, Drexel has been accused of being "the brass knuckles, threatening, market-manipulating Cosa Nostra of the securities world."

- The commodities industry, subject of one of the largest FBI stings in history, is bracing for indictments arising out of alleged massive fraud. Firms and individuals on both the Chicago and New York exchanges are allegedly involved.

- Several high-ranking Department of Defense officials and officers of military contractors and consultants have been indicted or convicted in "Operation Ill Wind," a massive probe of defense procurement fraud.

White-collar crime, then, is not merely an assault on ethics or social aesthetics. It imposes real costs on consumers, competitors, and the economy as a whole. In 1986, the Justice Department estimated that white-collar crime cost victims and society as a whole over $200 billion. And the S&L bailout, largely if not solely the product of private sector fraud and abuse, will bloat the budget deficit or lead to higher taxes for years to come.

Public prosecutors cannot combat this phenomenon alone. Federal and state law enforcement and regulatory agencies simply lack the resources to detect -- let alone to pursue -- endemic fraud. "The Justice Department doesn't have enough resources," William C. Hendricks, chief of the Justice Department's Fraud Section, said of the S&L crisis. "The U.S. Attorneys don't. We don't." President Bush's request for $50 million to fund investigation and prosecution of S&L officials involved in criminality was merely the most prominent recent acknowlegment of this enforcment gap.

Inadequate prosecutorial resources hinder enforcement of securities laws as well. According to then SEC chairman David Ruder, from 1980-1989 securities sales increased seven times in value, while relevant SEC staff grew from only 269 to 284. The agency had been forced to allocate half its enforcement budget to the Drexel prosecution (until the firm admitted guilt). At the same time, the SEC declined to prosecute fraud arising out of the bankruptcy of the Washington Public Power System (WPPS) because it simply lacked the resources to pursue two major cases simultaneously.

In short, it is increasingly clear that white-collar crime has shaken the very foundations of our economic institutions. It has reached the proportions of a major social problem. Without the activities of victims and "private attorneys general," financial swindlers and sophisticated felons know that their chance of getting caught and punished is slim. Civil RICO may not be the perfect instrument to address this white-collar crime wave. Nonetheless, it is a potent tool -- and sometimes the only available tool -- to give victims themselves the ability to bring wrongdoers to justice.

II. THE IMPORTANCE OF CIVIL RICO TO CONSUMERS

Civil RICO is one of the consumer's best remedies against white-collar crime and other forms of sophisticated criminal behavior.

First, civil RICO provides for automatic treble damages. These damages serve a deterrent as well as compensatory function. Without treble damages, the possible punishment for engaging in financial crime (if the malefactor is caught) would be merely returning what was taken -- to give the money back. It is axiomatic that economic crime will not be deterred unless penalties are greater -- far greater -- than actual damages, since the chance of detection and punishment are so low. If persons considering embarking on a coldly-calculated financial racket know that they face automatic treble damages, there is more of a likelihood that they will refrain from criminal behavior. In addition, court-awarded restitution alone does not compensate victims for the psychological and emotional distress they have suffered, nor do they provide for interest on the money stolen. Treble damages help compensate these losses as well.

Second, by providing for recovery of attorney's fees, it enables victims who otherwise would not be able to hire an attorney to bring their cases to court. In addition, unscrupulous defendants can easily increase the cost of litigation so that, without attorney's fees, the average person stands little chance.

Third, the existence of a federal forum provides necessary procedural benefits to victims of multi-state systemic criminal behavior. Current law does not require that a state court allow the plaintiffs in an interstate scheme to sue out-of-state defendants in one state's court. Not only could this result deprive victims of being able to receive compensation for their losses, but it may enable the crimes to continue unabated in other states. Furthermore, litigation of these complex criminal schemes would be open to inconsistent rulings on the same facts and would be much less efficient without the ability to bring suit in federal court.

Victims of white-collar crime are often the elderly, poor, disabled and illiterate -- among the most vulnerable members of society and those least able to protect their own interests.

For example, nine plaintiffs sued Atlantic Permanent Federal Savings and Loan claiming that the bank conspired with home-improvement dealers in a scheme to obtain second mortgages on lower- and middle-class homes without the knowledge of the homeowners. The defendants allegedly targeted elderly, poor and handicapped people, and it is estimated that 500 to 750 people were victimized by this fraud. The nine named pliantiffs lost their homes as a result of this scam. Civil RICO enabled these impoverished victims to successfully sue the largest bank in Norfolk, Virginia for perpetrating this scheme. Tellingly, although civil RICO provides for automatic treble damages, the settlement agreement with the bank awarded less than actual damages to each victim. Clearly, treble-damage liability was important to encourage settlement, but did not result in "windfall" gains for any of the parties. It did, however, give these downtrodden people the means with which to vindicate their rights.

In another case, 423 residents of a retirement community successfully sued the mortgagee for participating in a scheme to fraudulently induce them to purchase life-time occupancy agreements. Many of the plaintiffs invested their life savings to purchase what they believed would be a residence to take care of their needs for the remainder of their lives. After $60 million had been paid into the village, these elderly, ill and disabled people discovered that the facility had always been financially unsound and faced possible collapse.

The victims of this scam used civil RICO to sue the perpetrators and save themselves from financial ruin. Under the terms of the settlement agreement, the entire mortgage indebtedness of the village was cancelled, and more than $13 million was restored to the victims. In testimony before this subcommittee in 1986, the attorney in this case stated that "there is no question in my mind but that the results in our lawsuit would not have been attainable were it not for the RICO statute."

III. "THE FLOOD"

Proponents of eviscerating civil RICO decry a "flood" of abusive lawsuits, swamping the federal courts and terrorizing defendant corporations. For example, Rep. Rick Boucher (D-VA), the lead House sponsor of companion legislation to S. 438, has variously stated that "one quarter" or "one sixth" of federal suits are civil RICO suits.

In fact, there is less a flood than a trickle. Because of the stringency of the statute, few civil RICO cases are filed, and even fewer brought to trial.

According to the Administrative Office of the United States Courts, out of 240,000 federal cases filed from July 1, 1987 to June 30, 1988, fewer than 1,000 were civil RICO cases -- less than one-half of one percent of the federal docket. And fewer civil RICO cases were filed that year than the previous year. Some critics of RICO argue that these statistics are too low, since they are derived from a cover sheet filed with the court when a lawsuit is filed. Lawyers include a RICO count, it is asserted, but then fail to check off the appropriate box. Even so, such higher figures would fall dramatically short of a "flood." For example, if the Administrative Office is wrong by a factor of five, then only 2.5 percent of federal cases include civil RICO counts.

Moreover, any time a civil RICO count is merely "thrown in" with other federal counts, removing the incentive to use civil RICO will not remove litigants from federal court. Any plaintiff who tacks a RICO count onto a securities, commodities, antitrust or other federal lawsuit would continue to maintain a federal cause of action.

In addition, the courts are currently capable of addressing inappropriate uses of civil RICO. Foes of civil RICO frequently brandish lurid examples of inappropriate suits. Yet a spokesman for the National Association of Manufacturers admitted at a securities regulators' conference that these examples were "silly." More important, all available evidence indicates that the vast majority of civil RICO lawsuits are dismissed in the defendant's favor.

- Between 1970 and 1988, defendants won motions to dismiss or for summary judgment in two-thirds of 1,820 written civil RICO decisions, according to Andrew Weissman, former executive director of the ABA task force on civil RICO.

- Motions to dismiss were granted in 50 percent of reported RICO decisions in 1985 and 1986, according to a study done by G. Robert Blakey, Notre Dame law professor and principal drafter of RICO.

- Twenty-four of 34 "abusive" civil RICO cases often cited by supporters of the Boucher-DeConcini bill were dismissed before trial, according to congressional testimony given by Professor Michael Goldsmith of Brigham Young School of Law. These dismissed cases included a lawsuit by a journalist against ABC TV, a dispute between two rabbis, and a divorce case.

- The prevailing interpretation of "pattern" among the federal courts requires a showing of more than one criminal act and actual ongoing criminal behavior or the threat that the behavior will continue. Where a plaintiff alleges merely multiple mailings connected to the same fraud, an abuse commonly cited by RICO's opponents, most courts will dismiss the suit for failing to show a "pattern" of activity. The Supreme Court will shortly rule on H.J. Inc., a case that will clarify even further the scope of "pattern."

In the remaining cases, there is simply no evidence of a plague of extortionate settlements. In civil RICO cases that reach a jury verdict or are settled in favor of the plaintiff, damages actually paid out are often less than the actual amount lost by the victim. Rarely, if ever, do they approach three times the actual damages. According to independent journalist Kenneth Jost in Congressional Quarterly's Editorial Research Reports:

> In fact,...damages actually paid in many of the big cases have not even equaled the amounts plaintiffs claimed to have lost, much less exceeded the loss....Even some of the critics of RICO concede that plaintiffs are not routinely collecting windfalls beyond the amount of their actual losses. "You tend to get closer to the untrebled amount because of the trebling," says Edward F. Mannino, a Philadelphia attorney and a member of the American Bar Association's Special RICO Coordinating Committee. Susan Getzendanner, who handled many RICO cases as a federal

judge in Chicago and is now with a private law firm, says in her tenure on the bench she never saw a settlement she considered unjust or a settlement by an innocent party.

Balanced against the scant evidence of extorted settlements is the need for adequate remedies for victims of white-collar crime. An unprecedented survey of judges and lawyers, conducted by Louis Harris and Associates for Judiciary Committee chair Joseph Biden, shows why a powerful remedy is needed. Sixty percent of judges, 58 percent of defense lawyers and 51 percent of corporate counsel believe that individuals and small businesses are less likely to get a fair shake in the civil courts.

IV. PROPOSED LEGISLATION: S. 438

For the third Congress in a row, legislation that would gravely weaken civil RICO has been introduced. This session, the proposal has been introduced by Sens. Dennis DeConcini, Orrin Hatch and Steven Symms. A plan similar to S. 438 passed the Senate Judiciary Committee last year, but did not come to a floor vote due to opposition to the plan's retroactive application, its securities exemption, and its retroactive restriction on state Insurance Commissioners' ability to use civil RICO to combat fraud.

We believe that this legislation's approach is deeply flawed. An already complex statute will be rendered convoluted and virtually unusable. Instead of careful clarification of the statute to ensure that it remains a potent tool against white-collar crime, S. 438 creates a hodgepodge of special provisions for specific industries, confusing categories of plaintiffs, and retroactive reductions in liability.

In particular, we are troubled by several specific provisions.

A. General elimination of automatic treble damages

Under current law, all plaintiffs who meet the law's standards are eligible to receive treble damages plus attorneys fees. The legislation reduces possible liability to private plaintiffs under civil RICO to actual damages (and no attorneys fees) unless the defendant has already been criminally convicted for the exact same fraud. In short, nearly all defendants' liability is reduced by two thirds, even in cases of ongoing, egregious fraud. This proposal is even more restrictive than last session's legislation (S. 1523), which allowed private plaintiffs to receive attorneys fees.

Law enforcement against ongoing economic crime succeeds only when the potential penalty exceeds the gain from the illicit conduct. By limiting most plaintiffs to actual damages, S. 438 dilutes deterrence and hinders private enforcement of the law -- a central component of white-collar law enforcement. This general detrebling defangs civil RICO. For business plaintiffs, civil RICO would effectively cease to exist -- the possibility of actual damages rarely justifying the cost, complexity and rigorous requirements of proving a civil RICO case.

Fundamentally, we believe that reduction of availability of damages takes precisely the wrong approach to reforming civil RICO. Indeed, the legislation's scheme actually helps culpable defendants more than innocent ones: only if a person can prove a pattern of fraudulent acts committed through an enterprise are damages cut by two thirds. This proposal does not bar frivolous or abusive suits. For example, we agree that the lawsuit by Frank Lorenzo Texas Air Lines against the International Association of Machinists is properly described as "abusive." Yet Lorenzo has asked for $1.5 billion in actual damages -- a claim for damages that S. 438 would still allow. Without doubt, the union would continue to vigorously (and expensively) contest this case even if only actual damages were at issue.

This reduction to actual damages applies to all businesses, large or small; tax-exempt organizations; mutual funds; other institutions; foreign governments; and individual victims of crimes other than consumer fraud. Since institutional plaintiffs are best equipped to bring RICO suits -- and advance the deterrent effect envisioned in the statute -- they should not be discouraged from doing so by being limited to recovering actual damages.

In addition, small businesses that have been victimized should be able to seek multiple damages because the disparity in power and resources between a small business and a large conglomerate is often as great as the gulf between an individual plaintiff and a business defendant. For example, one small firm in Washington state was put out of business by the illegal dumping of toxic wastes next to the firm's place of business. Through the use of civil RICO, the firm secured a multi-million-dollar settlement from Boeing, the principle source of the waste. According to the plaintiff's attorney, without civil RICO's treble damages, they would have been unable to obtain this settlement.

This reduction in damages applies to individuals who have been victimized in some capacity other than as consumers (for example, as employees). Thus, executives of Ashland Oil, who recently were awarded treble damages in a civil RICO lawsuit because they were discharged and harassed when they blew the whistle on violations of the Foreign Corrupt Practices Act, would have been eligible for only actual damages under S. 438. This lawsuit was the only enforcement action under which Ashland paid _any_ penalty for the tens of millions of dollars in bribes that the company allegedly paid to foreign officials. Without RICO's treble damages, Ashland's only punishment would have been to pay its former officials the copensation they would have been owed had they not been wrongfully fired.

And it reduces the amount of damages available to foreign governments. For example, the Government of the Phillipines has used civil RICO twice in connection with the corruption surrounding its predecessor regime under Ferdinand Marcos -- once in a lawsuit against Marcos himself (which sought to recover assets allegedly stolen from the people of the Phillipines), and another against Westinghouse (alleging bribes paid to Marcos to win a nuclear power plant construction contract). The legislation would _retroactively_ relieve Marcos of two-thirds of his potential liability.

B. _Consumer suits: the phantom remedy_

S. 438 allows consumers to seek capped punitive awards up to twice actual damages, plus attorneys fees. In reality, however, the legislation establishes an all-but-impossible standard for consumer damages that will render civil RICO effectively unusable for consumers.

First, these punitive damages must be proven in a second proceeding, after the plaintiff has already proven that the defendant committed multiple unlawful acts. In all likelihood, this consumer damages proceeding will be the third proceeding, since the legislation creates a first trial for the regulated industries' affirmative defense (see discussion below).

Second, in this post-trial trial the consumer plaintiff must prove "by clear and convincing evidence" that the defendant's conduct was "consciously malicious." These higher standards are imposed after the already rigorous requirements of a civil RICO trial. Judges could easily read this proposal as rarely, if ever, allowing consumer punitive damages.

Few victims of massive consumer fraud will be willing to risk three separate proceedings and prohibitively restrictive standards for punitive damages -- that is, if they can obtain a lawyer at all. The procedural obstacle course strewn in consumers' path is simply too grueling. The language of S. 438 renders the consumer damages provision more loophole than law.

And for consumers or other natural persons, elimination of automatic treble damages vastly diminishes the potency of the tool. Since the great majority of successful civil RICO cases -- like most civil cases generally -- are settled before trial, the loss of the automatic hammer of treble damages will inevitably reduce the settlement value of most cases to less than actual damages.

C. Securities and commodities exemption

S. 438 limits all plaintiffs -- whether individuals, tax exempt organizations, or businesses -- to actual damages plus attorneys fees when "State []or Federal securities or commodities laws make available an express or implied remedy for the type of behavior on which the claim of the plaintiff is based . . ."

(i) Securities exemption

Few industries are as undeserving of blanket exemption from law enforcement as the securities industry. Yet under the bill, nearly all defendants whose crimes fall under any securities law are exempted from damages beyond actual damages.

This evisceration of civil RICO could not come at a more perilous time for the safety and soundness of the securities markets. As the seemingly never-ending insider trading scandals indicate, securities markets are both inadequately policed and governed by an inadequate body of law. The Securities and Exchange Commission and prosecutors have lately been vigorous -- and visible -- in efforts to apprehend inside traders. But securities enforcement generally is understaffed and underfunded. Existing federal private rights of action do little to enhance deterrence. The courts have recognized an implied private right of action under the securities laws for those who are fraudulently induced to purchase or sell securities, but only for actual damages. Essentially, a defendant who has committed an ongoing pattern of indictable securities fraud is required simply to give the money back.

When the pattern is sufficiently egregious, this remedy can be woefully inadequate. Consider, for example, a scam by a top New York Life Insurance agent in Portland, Oregon. The agent solicited several million dollars from investors and then lost or diverted their funds. Among his victims was an elderly couple whose life savings was invested and then lost. The reason for the investment was that the husband had Alzheimer's disease, and the couple needed a secure yield on their money. Another victim was a newly widowed mother with small children. She invested approximately $137,000 from her husband's life insurance policy for care and education of herself and her children. All her money was lost. Under S. 438's securities exemption, these individuals -- all of whom sued under civil RICO -- would not have been eligible for damages greater than actual damages.

The securities exemption is murkily drafted and may possibly leave many plaintiffs with no remedy at all. Since it is triggered when state or federal "laws make available an express or implied remedy for the type of behavior on which the claim of the plaintiff is based," (emphasis added), it is possible that a plaintiff for whom some federal or state securities laws provide a remedy, but who is unable to use that remedy, would be barred from seeking greater than actual damages under civil RICO. If nothing else, this ambiguity guarantees proliferation of litigation should the legislation become law.

One exception is made to the rule of reduction to actual damages: insider trading. But this exception to the securities exemption is extremely narrow. First, it does not apply to business or institutional plaintiffs who may have been damaged by insider trading. Second, it applies only to principals, excluding persons or firms responsible under theories of respondeat superior or controlling person liability. Although insider trading law is in flux, and it is hard to ascertain to what degree courts will countenance civil RICO for insider trading, it has been persuasively argued that civil RICO is an appropriate and effective method to deter massive, difficult-to-detect stock fraud.

Moreover, there is no principled reason to treat insider trading differently from other forms of massive, ongoing stock fraud. After all, other types of securities violations -- including stock parking, failure to disclose holdings, etc. -- can be a part of a massive criminal scheme. Drexel Burnham Lambert, for example, admitted not only insider trading but other forms of stock fraud as well; and the charges brought against Michael Milken only partially rest on an alleged pattern of insider trading.

Clearly, the difference between insider trading and other forms of securities fraud is one of publicity, not policy. If white-collar crime remedies are adequate and civil RICO is merely a frivolous club used to extort funds from "legitimate" business, why should insider trading be treated differently from other securities crimes? This lone exception to the securities exemption throws into sharp relief the legislation's tilt toward white-collar defendants.

Insider trading is the white-collar crime du jour. Three years ago, it was check kiting. Three years from now, who knows what evidence of institutional corruption will be uncovered? Who knows who the future Boeskys are, and what they will have done? All we can know is that whoever they are, wherever they are, this legislation would reduce their liability.

(ii) Commodities exemption

Commodities and telemarketing fraud is widespread, costing the public up to a billion dollars per year. Commodities fraud is perpetrated by "legitimate" firms (i.e., firms registered with the Commodities Futures Trading Commission under the provisions of the Commodities Exchange Act); but, just as dangerously, it also is conducted by informal, nonregistered firms. These boiler-room scams prey on senior citizens and the poor, peddling non-existent gold bullion, precious metals and other commodities. In 1982, according to the Senate Committee on Governmental Affairs, off exchange boiler-room fraud cost consumers approximately $200 million each year; by 1986, the Wall Street Journal put the number at over $300 million. California alone was plagued by 200 illegal boiler room operations in December of 1985, according to the Christian Science Monitor.

Jurisdictional gaps, inadequate remedies and scarce prosecutorial resources leave victims of these off-exchange commodities scams frequently unprotected. Consumers have a private right of action for commodities fraud and victims may also enter the CFTC's reparations program to seek compensation from registered firms. (In FY 1983-1987, a total of 2,353 reparations complaints were filed with the CFTC.) However, victims of boiler-room schemes must rely on private litigation, which allows for no more than actual damages; for typical investors, the costs of private litigation combined with the uncertainty of recovery makes suing to receive actual damages economically unfeasible. Civil RICO suits for treble or punitive damages can provide the only financially sound route to recovery for these otherwise frustrated fraud victims. For that reason, the American Association of Retired Persons (AARP) and National Association of Attorneys General have advised senior citizens that civil RICO is one of their only tools against victimization.

D. Retroactivity

The legislation's provisions limiting recovery in most RICO cases to actual damages would apply retroactively to pending cases, with few exceptions. This retroactivity provision would bestow a windfall upon most current RICO defendants, whose liability -- no matter how clearly established -- would be abruptly reduced. Aside from benefiting white-collar defendants, this provision is utterly unfair to plaintiffs who, relying on a federal statute that encourages citizens to act as "private attorneys general," have invested considerable time and resources pursuing their RICO claims.

If Congress retroactively limits liability here, it will likely prompt an avalanche of similar pleas from powerful lobbying forces. From now on, defendants who face the prospect of losing in court will turn to the court of last resort -- Congress -- whenever the burden of liability becomes onerous. Like iron filings to a magnet, disgruntled defendants will be drawn to the legislative process, clogging an already crowded legislative agenda. And plaintiffs will have little choice but to turn to Congress to argue their side as well.

Retroactivity not only alters the rules of litigation -- it bails out some defendants who have engaged in massive, ongoing patterns of criminality. Consider, for example, the case of Bernstein v. IDT Corp.. In Bernstein, a trustee for a bankrupt subcontractor of General Dynamics Corp. is suing General Dynamics and other defendants charging that the bankrupt corporation was the victim of extortion by a number of General Dynamics officers, including the fugitive P. Takis Veliotis. Also involved in the case are allegations of perjured deposition testimony by Veliotis, and General Dynamics' alleged knowledge and active concealment of both the perjury and the illegal scheme. One major individual defendant has been convicted of RICO criminal offenses. Other individual defendants have been indicted and have fled the country. Yet because the bankruptcy trustee is not acting as a natural person, his claim would be reduced to one-third its original value covered by the statute's retroactivity provision.

E. Procedural roadblocks for regulated industries

Regulated industries such as savings and loans, banks and insurance companies are given a special "affirmative defense." The provision allows a defendant to delay trial by arguing that it acted in reliance on the action or inaction of a regulatory agency. (It is most strongly supported by the insurance industry; insurance rates often become effective by operation of law when filed with state insurance commissioners, without need of actual approval.) Plaintiffs, including attorneys general, insurance commissioners, bank regulators and other government agencies, would have to disprove this contention before beginning discovery proceedings -- a procedural delay that could add years to any civil RICO case.

F. Prior criminal conviction provision

S. 438 retains automatic treble damages for the narrow class of cases in which the primary defendant has been convicted of a felony "based upon the same conduct upon which the plaintiff's action is based." This provision in fact provides little succor to victims of white-collar crime.

First, many egregious frauds never result in a criminal conviction. As discussed above, prosecutors lack the resources to pursue and convict most white-collar criminals. Also, many defendants escape criminal prosecution, not because they are not guilty, but because they have been granted immunity in return for their cooperation in a criminal investigation.

Second, the defendant must have been convicted of the exact same fraud as the conduct alleged by the victim. Consider, hypothetically, a swindler who uses a savings and loan to defraud consumers. If he defrauds one consumer through the sale of bonds, and is convicted, another consumer defrauded that same week through the sale of stock would eligible for neither treble damages nor punitive damages (because of the securities exemption).

Even Drexel Burnham Lambert would escape treble damage liability in many cases. The investment firm has agreed to plead guilty to only six criminal counts, although the SEC's complaint against the firm alleged improper conduct in at least seventeen different transactions. Under the bill, victims of a stock fraud in a transaction for which Drexel did not agree to plead guilty could not receive automatic treble damages, even if the victims could prove Drexel's guilt beyond a reasonable doubt. Moreover, if the crime were stock fraud other than narrow forms of insider trading, the victims would only be entitled to actual damages.

V. AN ALTERNATIVE APPROACH

If Congress deems it necessary to reform RICO, it should do so by narrowing the statute to ensure that it is only used for egregious cases of criminal activity -- not by broadly slashing damages. Several avenues for careful reform exist. Some provisions might include:

A. Deletion of the label "racketeering" for some offenses

Proponents of weakening civil RICO argue that it is unfair for defendants to be branded "racketeers" simply by dint of being sued. We agree. Such a change would protect defendants from unfair imputations without, in itself, altering the substantive liability or damages embodied in the rest of the statute.

B. Tightening the definition of "pattern"

The heart of proving a RICO case is showing that defendants engaged in a "pattern" of criminal activity. RICO currently provides that a proof of a pattern "requires at least two acts of racketeering" within a 10 year period. In the 1985 case of Sedima, S.P.R.L. v. Imrex Co., the U.S. Supreme Court wrote in a footnote that "pattern" includes the concept of "continuity plus relationship," thereby implying that it requires more than mere proof of two racketeering acts.

Opponents of civil RICO warn that defendants can be ensnarled in the civil RICO net as a result of only isolated or sporadic conduct. We believe that the courts are adequately addressing the pattern issue. (The Supreme Court is currently considering the validity of the 8th Circuit's interpretation of pattern in a case that was argued last November (H.J. Inc. v. Northwestern Bell Telephone Co.).) However, if the Congress wishes to statutorily clarify "pattern" several options are available. The National Association of Attorneys General has proposed the following statutory definition:

> "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity that:
>
> (A) are related, where applicable, to the affairs of an enterprise,
>
> (B) are not isolated, and
>
> (C) are not so closely related to each other and connected in point of time and place that, while having multiple bases of jurisdiction, including use of the mails, wire communications, or interstate travel or transportation, they constitute a single transaction involving only one victim not evincing continuity of

activity."

C. Narrowing predicate acts in commercial disputes

Concerns about abuse of civil RICO have largely centered on suits by businesses against other businesses over "garden variety contract disputes." These suits often rely on mail fraud or wire fraud as the predicate acts. One means to trim civil RICO in these cases without severly curtailing its usefulness against white-collar crime would be to reduce damages in suits by one commercial business against another where the sole predicate acts alleged are mail fraud or wire fraud.

D. Requiring verification and particularity of pleadings, and sanctions for failure to comply

We support the provision in S. 438 requiring that the facts supporting the claim against each defendant be averred with particularity. This is already the law for claims of fraud, and we believe it is appropriate to extend this requirement to other civil RICO claims in light of the statue's powerful remedies.

If these requirements are not met, the court may impose sanctions. We support these efforts to curb abusive uses of civil RICO without weakening the statute's effectiveness agianst perpetrators of ongoing criminal schemes.

E. Labor disputes

One area where a civil RICO suit can unfairly burden a defendant is a suit during the course of a labor-management dispute, particularly by management against a union during a strike. Representatives of organized labor argue that unions and employers should be prohibited from suing each other under civil RICO during the course of a labor dispute, analogizing the situation to the supplanting of civil conspiracy doctrine with labor law principles in the Norris-LaGuardia and Wagner Acts.

We support amending civil RICO by including a labor dispute exemption, which would allow civil RICO suits against unions in all instances except in connection with and during the course of a labor dispute. We believe this is appropriate, even though we remain opposed to a securities exemption, for several reasons.

First, beginning with Norris-LaGuardia, Congress has created a large body of law implying that labor disputes should be governed only by collective bargaining laws, and not by the federal courts. The securities laws, on the other hand, do not bar the use of other laws. For example, before RICO, egregious securities-related fraud had been prosecuted under the tax laws, mail fraud laws, or bank fraud laws. As United Mine Workers General Counsel Earl V. Brown noted in an article for the RICO Law Reporter, Congress specifically intended to cover criminal infiltration of unions, but not labor-management disputes. NLRA violations, unlike securities fraud, was not included as a predicate act.

Second, there is no evidence of a boom in labor racketeering related to disputes with management. There is strong evidence of pervasive criminal activity on Wall Street.

VI. CONCLUSION: CONGRESS SHOULD STRENGTHEN, NOT WEAKEN, LAWS AGAINST WHITE COLLAR CRIME

White-collar crime ravages trust in major social institutions, costs the public untold millions of dollars, and robs victims and honest businesspeople of the ability to fairly participate in our economy. Recent events have demonstrated just how heavy a tax this rampant illegality levies on business and government.

Yet at the very moment Congress should be strengthening laws against white-collar crime, it is considering legislation that would strew obstacles in the path of deterrence and compensation. Current laws against white-collar crime (e.g., laws against telemarketing fraud) should be strengthened, and an array of new laws and protections against white-collar crime and private-sector irresponsibility are needed. But it makes no sense whatsoever to weaken one of the few tools currently available against economic corruption. We strongly urge this committee to oppose legislation that would diminish deterrence and compensation.

PUBLIC CITIZEN

Buyers Up ☐ Congress Watch ☐ Critical Mass ☐ Health Research Group ☐ Litigation Group

November 10, 1989

Sen. Dennis DeConcini
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Sen. DeConcini:

Thank you for the opportunity to testify on S. 438, legislation to amend the Racketeer Influenced and Corrupt Organizations Act (RICO). I am writing to respond to questions submitted by Sens. Thurmond and Humphrey.

QUESTIONS SUBMITTED BY SEN. THURMOND:

1. With regard to pending cases, do you feel that the language in this proposal is adequate to allow continued pursuit of treble damages for meritorious RICO actions? Why or why not?

We do not believe that the language included in the legislation does adequately allow continued pursuit of treble damages for meritorious RICO actions, for two reasons.

First, the legislation's provision limiting recovery in most RICO cases to actual damages would apply retroactively to pending cases, with few exceptions. This provision would bestow a windfall upon most current RICO defendants, whose liability -- no matter how clearly established -- would be abruptly reduced. Aside from benefitting white-collar defendants, this provision is utterly unfair to plaintiffs who, relying on a federal statute that encourages citizens to act as "private attorneys general," have invested consdierable time and resources pursuing RICO claims.

Second, the legislation does not allow "continued pursuit of treble damages for meritorious RICO actions" even prospectively. Treble damages would be allowed only in suits brought by most -- not all -- government entities, or if the defendant has already been convicted of the exact same fraudulent scheme as alleged in the civil suit. By refraining from narrowing RICO, but slashing the damages for all suits, proper or improper, this reform scheme effectively benefits culpable defendants (who shed liability) more than innocent ones (who can still be dragged into court).

We support your decision, as reported in the press, to apply these RICO revisions prospectively only. However, such an improvement does not cure the legislation's infirmities as they apply to future suits.

2. Along with any effort to amend RICO, do you feel that it is appropriate to require a standard of more culpability for the award of punitive damages?

No, we do not. (I am presuming that this question refers to punitive or multiple damages generally, as opposed to RICO specifically.) Punitive damgages are rarely awarded, and are only awarded when a jury finds liability and determines that the defendant has acted egregiously or in some other manner deserving punishment. Otherwise, the legal system would do little to deter socially dangerous behavior (such as knowingly distributing dangerous products, or engaging in massive fraud). In products liability cases, for example, a defendant corporation that conceals product dangers from the public would simply be able to factor in liability as a cost of doing business, even in cases of egregious wrongdoing. Similarly, in consumer fraud cases, sophisticated swindlers would know that in the slim chance that they are caught, they need merely give the money back.

3. How do you respond to the assertion by the Department of Justice in their testimony last year that there was a pressing need for civil RICO reform because the statute was being abused by private plaintiffs?

We refer to our testimony, which spells out in detail the dearth of evidence of widespread abuse of civil RICO. According to the Administrative Office of the U.S. Courts, civil RICO cases amount to fewer than one half of one percent of all federal civil cases filed annually. This figure is undoubtedly an undercount. But even if the true number were double or triple this figure, it would still be fewer than two percent of federal filings -- hardly a "flood" of abusive cases meriting evisceration of the law.

To be sure, some abusive cases are filed. Most are quickly dismissed by judges, who are already hostile to civil RICO. And the appropriate way to deal with such abuses are to write them out of the statue -- to narrow the "pattern" definition, for example, or to explicitly state that probate or divorce cases are not RICO cases. But S. 438 merely cuts damages without narrowing RICO. Truly abusive suits would still continue to be filed -- but fewer legitimate suits against white-collar crime would be brought.

QUESTIONS SUBMITTED BY SEN. HUMPHREY:

1. Civil RICO actions have recently been brought against persons for engaging in protests or demonstrations. These actions have mainly involved anti-abortion protests, but the same theory could be used to bring a civil RICO action against other forms of First Amendment activity, such as anti-nuclear or anti-apartheid protests.

A. Do you consider this an appropriate or permissible use of the RICO statute.

B. Given the extreme breadth of the RICO statute, and the harsh penalties it imposes, isn't there a real danger that it can be used by both government and private plaintiffs as a means of intimidating and suppressing the exercise of legitimate First Amendment rights?

C. Can you give me any indication from the legislative history of RICO that Congress intended it to be used against persons engaged in demonstrations, protests or other forms of expressions unrelated to economic or commercial gain?

D. How would the essential and legitimate purposes of RICO be undercut or compromised if the statute were amended to make it clear that demonstrations, protests, and other forms of First Amendment activity were excluded from the statute's coverage?

These questions can best be answered jointly, since they largely address the same concern. Our interest in civil RICO is its use as a powerful tool against white-collar crime and organized crime -- socially dangerous activities that are conducted through a business or other enterprise, and which are difficult to deter through other legal means. We acknowledge and do not dispute the concerns that RICO may be improperly used to chill free speech activity. Therefore, we would not object to statutory revision that ensured that peaceful protestors are not successfully sued under civil RICO. (In fact, this is precisely the method we have advocated using for RICO reform -- that is, specifically identifying the types of suits deemed inappropriate, and removing them from RICO's reach. For that reason, we have also supported a labor dispute exemption.)

If you or your colleagues have any further questions regarding our views on this legislation, we would be happy to respond.

Sincerely,

Michael Waldman

Michael Waldman
Director
Public Citizen's Congress Watch

Senator DECONCINI. Mr. Reinhardt.

STATEMENT OF MARK REINHARDT, REINHARDT AND ANDERSON, SAINT PAUL, MN

Mr. REINHARDT. Thank you, Mr. Chairman. I am an attorney who has been involved in various RICO cases since 1985. In every one of these cases, I want to point out that they are class actions in which there were many thousands of individuals who lost very small sums of money compared to the huge sums of money received by the defendants.

One of these cases is *H.J.* v *Northwestern Bell Telephone Company,* currently pending before the U.S. Supreme Court. That case alleged a series of bribes taking place over a period of about 3 years carried out by Northwestern Bell against the Minnesota Public Utilities Commission. Hundreds of thousands of dollars were alleged to have changed hands in elaborate schemes which affected literally millions of dollars of rate increases.

Senator, although in our written remarks my office has assumed that retroactivity restrictions would apply to the *H.J.* case, upon further review it appears that because these were telephone users who are natural persons who have purchased telephone services, we would be able to sue underneath the new section 2(b), and consequently not be subject to those retroactivity sections, I would assume.

However, although this one suit, *H.J.,* involving a massive bribery of Government officials, may survive intact, an identical suit brought subsequent to this proposed legislation would be emasculated.

Indeed, in another RICO case in my office now pending for over 4 years, under the RICO reform being discussed it would probably eliminate the multiple damages and attorneys' fees.

I feel the proposed amendment suffers from three major faults. First, there is a special treatment for the securities industry, which has already been addressed specifically; second, the elimination of automatic treble damages.

In Minnesota, in the *H.J.* case, over 2 years ago the court of appeals affirmed a rate rollback in the part of the actual lawsuit that we are involved in, resulting in a $25 million overpayment to Northwestern Bell. Yet, to this date, not one dime of that $25 million has yet been paid.

Northwestern Bell has argued that despite the finding that the rate was tainted, there is no one or no authority to collect back that money, other than, of course, the instant lawsuit before the U.S. Supreme Court. This threat of treble damages, should we survive in the U.S. Supreme Court, may well force Northwestern Bell to discharge the sum to the people of Minnesota. This bill would remove this treble damage provision, which I believe is necessary to allow injured plaintiffs to recover at least what they have lost.

Thirdly, the retroactivity provisions. We have one class action right now which I mentioned was pending since 1985 involving 3,000 Minnesota class members. Passage of this legislation would totally change the nature of their recovery and dramatically affect the cause of this 4-year-old case, where, by the way, the defendant's motion to dismiss the RICO allegations was denied specifically by the court in a lengthy opinion.

I believe it should be the Senate's role to review pending legislation and achieve results through legislation rather than review pending litigation, as has been forth, I believe, by some of the proponents of RICO change.

Thank you.

Senator DECONCINI. Mr. Reinhardt, if I understand, you are a plaintiff in this Northwestern Bell Telephone case. Your RICO claim is the only Federal cause of action that was included in your lawsuit, is that correct?

Mr. REINHARDT. That is correct; that is indeed correct.

Senator DECONCINI. If that is the case, therefore, if not for the availability of civil RICO, this case would not have been brought before the U.S. District Court in Minnesota, is that right?

Mr. REINHARDT. Mr. Chairman, I should point out we brought the case in State court, also.

Senator DECONCINI. You did?

Mr. REINHARDT. Yes.

Senator DECONCINI. So you have your State causes of action, primarily Minnesota statutory prohibitions, right—bribery, common law bribery, and what have you?

Mr. REINHARDT. No, Mr. Chairman. The Minnesota State court said there were no State causes of action. There was solely the Federal cause of action.

Senator DECONCINI. The State court has ruled that there is no cause of action in the State?

Mr. REINHARDT. That is correct, affirmed by the court of appeals. The only action here is a Federal RICO action. In fact, in Federal court right now Northwestern Bell is arguing the Minnesota Attorney General has no——

Senator DECONCINI. Did you file in the State court?

Mr. REINHARDT. Excuse me?

Senator DECONCINI. Did you file an action in the State court?

Mr. REINHARDT. Yes.

Senator DECONCINI. And there, it was dismissed?

Mr. REINHARDT. That is correct.

Senator DECONCINI. And then you filed in the Federal court under RICO?

Mr. REINHARDT. I believe the Federal action preceded the State one, or they are contemporaneous. I am not sure of the exact time.

Senator DECONCINI. If the Federal action did precede the State one, did that prohibit proceeding under the State one?

Mr. REINHARDT. No.

Senator DECONCINI. It did not?

Mr. REINHARDT. No.

Senator DECONCINI. So you were able to really sue in both courts and pursue the litigation in both courts?

Mr. REINHARDT. Actually, what occurred in that particular case, I believe, was that the RICO issue in Federal court was dismissed underneath the pattern of racketeering allegations in the eighth circuit, and that is the current issue before the U.S. Supreme Court.

When that was dismissed, the Federal court, of course, did not take pendant jurisdiction on the State causes of action alleged. We went to State court with those causes of action and the State court said there were no State causes of action. So the only cause of action——

Senator DECONCINI. Excuse me. What was the reason they gave for that, because it was in the Federal court?

Mr. REINHARDT. No, no. There was no common law cause of action for bribery in Minnesota.

Senator DECONCINI. There was just no issue to be joined as far as they were concerned, as far as the State was concerned?

Mr. REINHARDT. Yes.

Senator DECONCINI. OK.

Mr. REINHARDT. No common law recovery allowed for the crime of bribery.

[The prepared statement of Mr. Reinhardt and response to questions follow:]

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SUMMARY OF JUDICIARY COMMITTEE TESTIMONY

I represent the plaintiffs in the case of H. J. Inc. v. Northwestern Bell Telephone Company, which is currently pending before the United States Supreme Court. The issue before the court is the applicability of the RICO statute in a massive bribery case. In H.J. Inc., it is alleged that, through a systematic series of plans, Northwestern Bell Telephone Company illegally influenced the rates of telephone users throughout the state of Minnesota. These alleged acts consisted of bribing various members of the Public Utilities Commission over a three year period, amounting in millions of dollars in overcharges.

We have, for the past three years, been proceeding with this case, on behalf of Minnesota telephone users, under the belief that the people of Minnesota would recover triple damages and their attorney's fees should they be successful. Of course, if they are successful, they will have proven that the utility company intentionally involved itself in bribery over a long period of time.

Now, there is a proposed RICO bill which would retroactively change the nature of the damages in this case. It should be noted that, despite the fact that a later utilities commission ordered a rate reduction of over $10 million because Northwestern Bell had tainted the regulatory process, not one dime has yet been paid back to the people of Minnesota. Northwestern Bell is arguing, in other forums, that no one has the power to make it refund charges, even though they were illegally gotten. The only method available to the people of Minnesota is this RICO case. Now, by attempting to retroactively change the rules, this Congress may well be cheating thousands of Minnesotans out of a recovery to which they are presently entitled. This is like changing the deck in the middle of a game - it just isn't fair.

Mark Reinhardt

RICO is Combatting Major Criminal Activity

RICO prohibits three categories of activity. These are (1) the investment of racketeering proceeds in an interstate enterprise (Section 1962(a)); (2) the acquisition or maintenance of an interest in an interstate enterprise through a pattern of racketeering activity (Section 1962(b)); and (3) the conducting the affairs of an interstate enterprise through a pattern of racketeering activity (Section 1962(c)). Racketeering activity is defined by reference to acts specified in 18 U.S.C. § 1961(1) and requires "at least two acts of racketeering activity...within ten years." 18 U.S.C. § 1961(5)(1982).

The passage of RICO was principally concerned with the infiltration of legitimate business by organized crime. United States v. Turkette, 452 U.S. 576, 591 (1981). RICO, however, has been used to address a larger number of other problems. See, Marshall-Silver Construction Company, Inc. v. Mendel, 835 F.2d 63 (3rd Cir. 1987)(action by general contractor for defendant's misconduct in allegedly filing fraudulent involuntary bankruptcy petition against the contractor); Illinois Department of Revenue v. Phillips, 771 F.2d 312 (7th Cir. 1985)(fraudulent state sales tax returns); United States v. Rubio, 727 F.2d 786 (9th Cir. 1984) (conviction of Hells Angels gang members); United States v. Dozier, 672 F.2d 531 (5th Cir.) cert denied 459 U.S. 943 (1982) (conviction of Louisiana Commissioner of Agriculture for extortion); City of New York v. Joseph L.

Balken, Inc., 656 F. Supp. 536 (E.D.N.Y. 1987) (action against sewer inspectors and contractors under RICO on basis of alleged bribery scheme).

In the case pending before the United States Supreme Court at this time, H. J. Inc. v. Northwestern Bell, 829 F.2d 648 (8th Cir. 1987) cert granted, ____ U.S. ____, 108 S.Ct. 1219 (1988), RICO was used to address bribery of public officials. This case is a putative class action brought by Northwestern Bell Telephone users in the State of Minnesota. In the complaint, petitioners allege that from January 1, 1980, through the present, Northwestern Bell conducted different acts of bribery directed at members of the Minnesota Public Utilities Commission who were sitting in their quasi-judicial function. Payments of over $100,000.00 were made to different commissioner through various methods by separate Northwestern Bell employees and agents. In one instance, payments were made through a middleman and were hidden in the defendant's records as "attorney's fees." In another ploy, employment negotiations took place with a sitting commissioner resulting in her recovering over $100,000 in "consulting fees" within a year after leaving the commission. In another scenario, parties, gifts and numerous meals were paid for by defendant from commissioners, the frequency of which rose dramatically during critical commission rate hearings.

Plaintiffs sought to recover damages suffered by plaintiffs and the class due to the improper rate increases. Plaintiffs requested interest, reasonable attorney's fees, punitive and treble damages. We are now awaiting a decision from the U.S. Supreme Court. Interestingly enough, the amici and respondent in the case have claimed that RICO should not apply to them because they are "legitimate" businesses. However, RICO is of no threat to "legitimate" businesses. Activities such as bribery are RICO predicate acts and are not new proscribed acts in this country. Particularly onerous in this case is that those receiving the bribes were entrusted with making fair and honest decisions to protect the rate payers of the State of Minnesota. Is this not exactly the type of case that RICO was designed to prevent?

It should be noted that a later Public Utilities Commission reopened at least one of the influenced rates, and lowered it considerably. Minnesota appellate courts affirmed this rolled back rate, because of the tainting of the quasi-judicial function of the Minnesota Public Utilities Commission Matter of Public Utilities Commission, 417 N.W.2d 274 (Minn. App. 1987). Yet Northwestern Bell has yet to refund the millions of dollars in overpayments, arguing that neither the M.P.U.C. nor the Minnesota Attorney General have the power to collect illegal charges. It would appear that only under RICO will the utility be forced to disgorge its ill-gotten gains.

One must question the motivation of those seeking to "reform" RICO. Particularly questionable is the proposal to remove the award of treble damages. Many RICO cases have been brought for the purpose of combatting massive fraud. Although arguments against RICO typically state that these cases are mere "garden variety" fraud, and should not be covered by RICO, this view is incorrect. Fraud is not a "garden variety" problem in the United States. Witness recent systematic fraudulent practices involving insider trading in the stock market. These cases involve millions of dollars of losses. Note also the recent failure of savings and loans involving millions in losses. These are not insignificant sums. It can be safely said that if mob related individuals had perpetrated these frauds RICO would be zealously applied. Those who are not disturbed by the proliferation of fraud in this country and loss of huge amounts of money may not be aware of the number of "legitimate" businesses engaging in illegal activities. "1,043 major corporations were indicted between 1970 through 1980: 117 convictions or consent decrees for 98 antitrust violations; 18 kickbacks, briberies or illegal rebates; 21 illegal political contributions; 11 frauds; and five tax evasions." See, e.g., Ross, How Lawless are Big Companies, Fortune, December 1, 1980, at 57, cited in Blakey and Cessar, Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO be Effective Only Against White-Collar Crime? 62 Notre Dame L. Rev. 526, 535, n.36 (1987). Indeed, the Department of Justice reported in 1984 that fraud accounts for losses exceeing 200 billion dollars annually. United States Department of Justice, Annual Report of the Attorney General, 42 (1984). See, Goldsmith, Civil RICO Reform: The Basis for Compromise, 71 Minn. L. Rev. 827, 833, n. 31 (1987), for a lengthy discussion of total amounts lost to fraud each year in this country.

When asking whether these types of suits should fall under RICO with its enhanced penalties, there are several considerations. In debating what "businesses" should be covered by RICO, does the Senate really wish to draw a distinction between organized crime type fraud and business type fraud? To the victim, does it really matter if the injury is perpetrated by a "legitimate" or "illegitimate" business? Do we wish to say that we excuse businesses from illegal activity and its substantial consequences under RICO because their illegal activity is not as "bad" as that of organized crime? To Minnesotans awaiting the outcome of the H. J. Inc. case, they would answer that bribery is bribery. In seeking recovery the H. J. Inc. plaintiffs are demanding that Northwestern Bell be brought to the bar of justice. The inclusion of treble damages and attorney's fees will right a wrong and act as a deterrent so that Northwestern Bell, and others will conduct activities in a legal manner in the future.

White collar crime in America today is a source of serious and huge losses to economy. Its losses are being felt by average Americans: from investors, to insureds, to telephone users. "White collar crime is 'the most serious and all pervasive problem in America today.' Although this statement was made in 1980, there is no reason to think the problem has diminished in the meantime." Braswell v. United States, 108 S.Ct. 2284, 2294, n.9 (1988) (citation omitted).

The reduction of damages from treble to actual damages, the exclusion of counsel fees for the prevailing party, along with retroactive application to pending litigation, appears, in essence to be special interest legislation strictly catering to the business community. It is true that Congress has latitude in making civil statutes retroactive. The constitution only prohibits ex post facto criminal legislation. However, the plaintiffs in all the pending cases brought their suits under the law in effect at the time of their injury; RICO could be applied to obtain treble damages and lawyer's fees. The principle behind prohibiting ex post facto legislation is that it is not fair to retroactively make activity illegal. Consequently, it is logical to presume that removing sanctions in effect at the time of activity is not fair to those who suffered from the activity.

Civil Rico potentially provides an effective way to combat fraud in this country through its treble damage and counsel fees. The damages and counsel fees encourage remedial litigation by private plaintiffs. This can be analogized to the provisions in the Civil Rights Act which includes attorney's fees. The purpose is obviously to encourage litigants to address wrongs society sees as requiring a deterrent. Clearly one of the purposes of the RICO attorney's fees provision was specifically to encourage private litigation. See, Alcorn County, Miss. v. U.S. Interstate Supplies, 731 F.2d 1160, 1165 (5th Cir. 1984).

Complex fraud litigation often requires resources that government agencies such as attorney generals' offices and county attorneys' offices may be unable to provide. Our firm has spent thousands of dollars and thousands of hours in prosecuting the H. J. Inc. case alone. Most injured plaintiffs would be unable to pay such fees. It is up to those who engaged in criminal activity to reimburse plaintiffs' damages which accrued as a result of their activity. Part of those damages is attorney's fees. If attorneys were not able to obtain payment for their services, it would clearly come out of the client's pocket. Many attorneys would take these cases on a contingency fee, therefore requiring that 1/3 of recoveries or more be paid as fees. To a plaintiff who has been injured, even with the loss of a small sum of money, this provides a hardship. They have already lost money to another's illegal actions. In order to retain those monies, they will need to pay attorney's fees. If the case is settled for less than the amount of actual damages, the plaintiff will have lost even more. It simply is not fair to penalize persons injured by another's intentional illegal activity by requiring that they cannot obtain the sums that were lost. Serious discussion of victims' rights are occurring in prosecutors' offices. Should not victims' rights be one of the concerns of this statute?

Furthermore, treble damages serves as a real deterrent and is a fair means of recovery for injured plaintiffs. First of all, if there are no treble damages, and the plaintiffs are successful in the H. J. Inc., case, Northwestern Bell will only be required to repay that which was misappropriated. Any interest, other investments, and other benefits that Northwestern Bell has derived from the use of this money over the last four years will be kept. This would be true in other areas of litigation such as in insurance scams and investment scams. This would allow those violators of the statute to prey upon others, safe in the knowledge that even if caught they will only forfeit what was illegally gained; all interim profits will be kept. Many times benefits reaped by the illegal activity can exceed the original fraud. Any deterrence effect attributed to RICO would be lost. If illegal activity is rewarded by enrichment beyond what was originally taken, what is there to lose? There is only much more to be gained.

As you know, antitrust statutes award treble damages. In determining the effectiveness of the treble damage provision, studies show that most treble damages suits were settled at close to the actual damages. Antitrust Treble Damage Remedy, serial number 8, House Committee on the Judiciary, 98th Cong., 2nd Session 14 (1984) Furthermore, as pointed out in Haroco Inc. v. American National Bank and Trust Company of Chicago, 747 F.2d 384, 399 n. 16 (7th Cir. 1984), aff'd on other grounds, 105 S.Ct. 3291 (1985), it was noted that due to the delays and uncertainties of litigation, many plaintiffs are compelled to settle valid claims for "a mere fraction of their value." The court noted that "RICO may arguably promote more complete satisfaction of plaintiffs' claims without facilitating indefensible windfalls." Id.

Michael Waldman, legislative director of Public Citizens Congress Watch, has stated that RICO's treble damages are exactly what is needed to go after large scale financial crime. Law enforcement against such economic crime succeeds only when the potential penalty exceeds the gain from the illicit conduct. RICO Law Reporter, July, 1988. Other cases show that RICO plaintiffs are not getting the return on the full amounts they have lost. For example, Anheuser-Busch settled an insider trading suit against the brokerage houses of Bear, Stearns & Co. and A.G. Edwards & Sons for less than 1/3 of the 60 million the company lost. 1 Congressional Quarterly's Editorial Research Reports, March 17, 1989, pp 142-43.

Finally, treble damages and attorney's fees have been in the bill since its inception. Simply because we are recovering RICO abuses from white collar establishments does not undermine the validity of the treble damages aspect of RICO that Congress originally sought to put in as a deterrent measure. Journalist Kevin Jost reveals that even RICO's critics can see that few defendants are actually paying out more than actual damages.

He quotes Edward F. Mannino, a member of the ABA's committee on RICO, stating that " 'You tend to get closer to the untrebled amount because of the [potential] trebling.' " Jost, The Fraudulent Case against RICO, California Lawyer, 49, 51 (May, 1989).

The treble damages and attorney's fees provisions of RICO serve a variety of purposes. First of all they serve as a deterrent upon those engaged in activity prohibited under RICO. If the potential defendant knows that all proceeds obtained through the illegal activity will be sought to be returned, and that treble damages will be assessed against him, he will see that engaging in this activity will no longer be profitable. Obviously, the way to deter defendants in the civil arena is to hit them in the pocketbook. As a part of public policy, then, we will be saying that society will not tolerate this kind of activity. Secondly, the treble damages and attorney's fees works to fairly compensate those who have been wronged. As I have discussed, plaintiffs do not always get a full return on what they have lost. If the treble damage provision is removed, the incentive to obtain any type of return is lost. The treble damages will allow a plaintiff to return to close to that which they have lost. This is fair, this is just.

Finally, any changes if made to the RICO statute should not be retroactive. What I have discussed with you is what is fair and just in achieving recourse against those who have injured innocent people. In the H.J. Inc. case for example, millions of dollars in illegal rates were obtained through the bribery of the commission. These are millions of dollars that the defendant has had to use in these last four years. Their enrichment goes far beyond the amounts that were obtained through the illegal rates passed by the commission. When this action was brought, plaintiffs viewed this as a recourse to obtain fully that which they had lost through illegal activity. To now change the rules in midstream is simply unfair: it is not just.

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June 12, 1989

Senator DeConcini
United States Senate
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: RICO Reform Act (S.438)

Dear Senator Deconcini:

Thank you for the opportunity to testify regarding the proposed RICO amendments. This letter will assist in supplementing the record and responding to questions at the hearing. I request it be placed in the record along with my material previously submitted.

Along with Senator Metzenbaum and Senator Kohl, I am disturbed by the retroactivity aspect of S.438. Although the case I argued, and which is presently pending before the United States Supreme Court, H. J. Inc. v. Northwestern Bell Telephone Company, is a class action consisting of all the consumers in the State of Minnesota who pay for telephone service, and therefore would be exempt from the retroactivity clause because a suit could still be maintained underneath proposed section B(2) of the new bill, retroactivity directly impacts on other cases in my office. These cases range up to four years in age, and both the plaintiffs and the defendants have dealt with them under the existing statute. These other cases are all class actions consisting of thousands of people who, individually, suffered relatively minor losses--but all these small sums added together amounted to illegal millions for the defendants.

You made inquiry regarding the separate state causes of action in the above mentioned H. J. Inc. case. As I indicated at the hearing, the state courts in Minnesota decided that there was no state cause of action which could redress the wrongs in this case. This opinion can be found at H.J. Inc v. Northwestern Bell Telephone Corp. 420 N.W.2d 673 (Minn. App. 1988), review denied May 16, 1988. Furthermore, despite the fact that at least one of the rates complained of in our lawsuit had been rolled back by a later Public Utilities Commission ruling because of "tainting" by Northwestern Bell officials, none of the $25 million illegally collected has been paid back to the people of Minnesota; this despite a Minnesota Court of Appeals decision affirming the rollback based on the tainting. Matter of Public Utilities Commission 417 N.W.2d 274 (Minn. App. 1987). Northwestern Bell is arguing in state court that our state Attorney General has no authority to collect back any of the "tainted" money, even just the small portion already rolled back by the Commission. Therefore, it appears that this RICO action may well be the sole method of redress; I believe the federal courts through RICO is the only avenue for the injured Minnesota consumers.

If you have a need for any further information, please do not hesitate to contact me.

Very truly yours,

Mark Reinhardt

MR:kas
enc.

cc: Senator Edward Kennedy

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June 27, 1989

Dennis DeConcini
United States Senator
Committee on the Judiciary
224 Dirksen Senate Office Bldg.
Washington, D.C. 20510

Dear Senator DeConcini:

Thank you for your letter of June 13, 1989. I enclose a supplemental letter sent to you last week, and answers to the questions posed by you and by Senator Thurmond.

Very truly yours,

Mark Reinhardt

MR:kas
enc.

RESPONSE TO RICO
QUESTIONS POSED BY
SENATOR DENNIS DECONCINI
AND
SENATOR STROM THURMOND

JUNE 27, 1989

By: Mark Reinhardt
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QUESTIONS BY SENATOR DENNIS DeCONCINI

Senator, your first question is broken into a number of issues, I will attempt to answer your questions in the order that you present.

1. Bradley line of cases.

Initially, Senator, you ask the effects of the Bradley line of cases regarding any amendment to RICO and my pending lawsuit. By this question, I assume you mean the affects on H. J. Inc. vs. Northwestern Bell. I would like to address your questions in relation to H. J. Inc., but also in relation to other cases my office is handling.

It is correct, as you state, that the Bradley line of cases indicate that any change in the RICO law may well be applied retroactively. Of course, in Bradley, as you are aware, the court did not create an absolute rule regarding retroactive application of changes in the law. The Court indicated that if a showing can be made of "manifest injustice", the Bradley reasoning would not apply. In Bradley, the Supreme Court fashioned a three prong test to determine whether "manifest injustice" would result from the retroactive application of the law on a pending case. The three elements that must be reviewed are: l) the nature and identity of the parties; 2) the nature of the parties' rights; and 3) the nature of the impact of the change in law upon those rights. Bradley v. School Board of City of Richmond, 94 S.Ct. 2006, 2019 (1974). Therefore, Senator, the effects of Bradley and its line of cases must be viewed according to each factual situation. You did, however, ask the effects of Bradley on H. J. Inc. I must point out that because H.J. Inc. is a class action of consumers, retroactivity would not apply because of the provisions of the statute. However, Bradley may well affect other cases my office is currently handling.

Clearly, making the legislation prospective in effect would have the effect of not changing the lawsuits already pending in the favor of defendants, but, would achieve any changes that Congress makes over a period of time. The reason that this method is far superior to one in which current suits are affected, is because prospective application avoids the appearance that special interest groups (large brokerage houses, commodities dealers, etc.), have achieved special interest litigation at the sacrifice of the individual who is bringing an action. When I represent my clients in cases, I am very careful to explain to them the pros and cons of litigation. This of course includes the remedies available. Changing the remedies when some of these suits are almost completed, constitutes a windfall to the defendants which in some cases, may be considered by the courts to be "manifestly unjust." I should point out that all of my cases involve class actions consisting of people who probably could not maintain a lawsuit by themselves because their losses are too small. However, the defendants in these cases have taken these small sums from thousands and thousands of Minnesotans. Consequently, a RICO class action is maintainable.

In your questions, you expressed some concern regarding the victims of RICO suits. I believe there is some problem in using the phrase "victims of RICO suits." The individuals who were victimized were the plaintiffs who bring the RICO suit, not the defendants who perpetrated the injuries upon the plaintiffs. I must point out that in every RICO case, in order to recover triple damages, a plaintiff must prove that the defendant acted, not only once, but twice, in an intentional criminal fashion. I see no justification for calling a person who commits such criminal activity a "victim." We decided, as you know Senator, long ago to punish those people who intentionally violate our antitrust laws with treble damages. Initially, the same outcry was raised regarding those treble damages as we now hear in the RICO situation. Nevertheless, we now find that half a century later, the antitrust enforcement is essentially brought about through private action (as opposed to government intervention) - this because of the treble damage. It would be impossible for the government to today bring to duplicate the scheme of enforcement which has taken effect in this Country, primarily due to that treble damage.

This leads me to your question regarding whether the provision you have drafted strikes a fair balance between the interest of plaintiffs and defendants. Initially I should point out that if a case is taken to trial under any suit and the plaintiff wins, the plaintiff will most likely obtain actual damages, attorneys' fees and litigation costs. Therefore, such a provision would have no affect on most cases tried. However, as you know, the vast majority of cases are settled prior to trial. Defendants in cases facing antitrust treble damages are settling those cases in the approximate range of the actual damages, not the treble damages. Likewise, in a RICO case that settles prior to trial, under your proposed retroactivity aspects of RICO, my clients would not be receiving the full measure of their damages. The attorneys' fees will come out of my clients' pockets and they will end up never having recovered what they lost. Consequently they will never be made whole, nor will they receive reimbursement for their "investment", in the litigation. This can be shown by reference to several cases.

Please remember that RICO is based upon criminal activity. Damages actually paid in many large cases have not equaled the amounts the plaintiffs have lost due to the defendant's criminal activity. For example, in a RICO/insider trading suit brought by Anheuser-Busch against the brokerage houses of Bear Stearns and Company and A. G. Edwards and Sons, the case was settled for less than l/3 of the amount an expert said that the company paid as a result of the inflated price of its acquisition target's stock. l Congressional Quarterlies Editorial Research Report, March 17, 1989, pp. 142-43. Anheuser-Busch's attorney stated that in calculating the proposed settlement accepted by the defendants, he factored in nothing for RICO damages. Kevin Jost, The Fraudulent Case Against RICO, California Lawyer, May, 1989, at 51. Similarly, in a RICO suit against Laventhol and Horwath, the nation's ninth largest accounting firm, a settlement was reached in the amount of $15 million dollars. This however was considerably less than the 20 million plus that investors in the business lost according to trial testimony. I Congressional Quarterly at 143.

These cases indicate that plaintiffs are not receiving even the actual damages that they have lost. Factor this in with attorneys' fees and court costs, in any settlement they receive even less. This also demonstrates that plaintiffs are not collecting windfalls beyond the amount of their actual losses. It has been noted that the treble damage provision only gives plaintiffs somewhat greater leverage in settlement of their suit than they have in other litigation. However, it has also been noted that "the treble damage lever tends to level the playing field." Quotation from Tom Hannan, RICO attorney in private practice, California Lawyer, supra p. 51.

In fact, even some of RICO's critics concede that view that defendants are paying windfalls beyond the actual amount of plaintiffs' damages. "You tend to get closer to the untrebled amount because of the trebling," states Edward F. Mannino, a Philidelphia attorney and member of the American Bar Association's special RICO coordinating committee. Congressional Quarterly, at 143. In fact, Susan Getzendanner, a former federal judge who handled many RICO cases and is now in private practice says that in her tenure on the bench, she never saw a settlement she considered unjust, nor did she see a settlement by an innocent party. Id.

Even the court has observed that the treble damages even things out for plaintiffs. As pointed out in Haroco v. American National Bank and Trust Company of Chicago, 747 F.2d 384, 399, n. 16 (7th Cir. 1984), aff'd on other grounds, 105 S.Ct. 3291 (1985), it was noted that due to the delays and uncertainties of litigation, many plaintiffs are compelled to settle valid claims for "a mere fraction of their value." The court noted that "RICO may arguably promote more complete satisfaction of plaintiffs claims without facilitating indefensible windfalls." Id.

It is clear then that many RICO plaintiffs do not recoup the amounts of their losses. This is even more so true if one considers that if a defendant has illegally obtained monies from the plaintiff, the defendant has had use of that money for investments, payment of interest and other allocation of resources. Any gains made by the defendant in a civil suit by the use of that money are kept by the defendant. This is because the defendant may compromise the suit by settling the amount. Therefore, even if the defendant has to pay back the actual amount illegally obtained, the defendant still has kept more than what they have lost. Meanwhile the plaintiff is never compensated for this portion of damages. Keeping the treble damages portion will assure that plaintiffs receive at least actual damages. Studies under the antitrust statute show that most treble damage suits are settled at close to actual damages. Study of the Antitrust Treble Damage Remedy, Serial number 8, House Committee on the Judiciary, 98th Cong., 2d Sess. 14 (1984). There is no reason to believe that a similar pattern has not and will not develop under RICO.

Finally Senator, I wish to point out that the treble damage feature in the act works as a deterrent for further criminal activity. There is no deterrent affect by a remedy that merely takes away what the wrongdoer should have not had in the first place. Conversely, if the wrongdoer is aware that they will be penalized in the amount of three times the amount they originally took, it is at least a good incentive to not perform the illegal activity in the first place. As stated in Note, Treble Damages Under RICO: Characteristics in Computation, 61 Notre Dame Law Rev. 526, 533-534 (1986):

> Treble damages have unique characteristics that can be creatively used to address the problems of sophisticated crime. Treble damages can be used to l) encourage private citizens to bring RICO actions, 2) deter future violators, and 3) compensate victims for all accumulative harm. These multiple and convergent purposes make the treble damage provision a

powerful mechanism in the effort to vindicate the interest of those victimized by crime.

At the turn of this century, monopolistic activity threatened our economic well-being. As the century draws to an end, it appears that civil fraud has taken the place of the robbers barons of yesteryear. The fraud committed in the boardrooms of America today is, again threatening the economic well-being of our country. If faith in our financial institutions and faith in our stock market fails, the effects will be enormous. Consequently, I cannot agree when you say that your amendment, or the repeal of the treble damage provision in RICO strike a balance between plaintiffs and defendants.

2.(a) Are any members of your class individual consumers of telephone sales and service.

The vast majority of the members of my class are individual consumers of telephone sales and service.

2.(b) Approximately what percentage of your class are consumers?

I do not have the answer to this question at this time - however, I would expect that the class would be divided approximately 2/3 consumers and 1/3 businesses.

2.(c) Wouldn't they be entitled to automatic treble damages?

Of course, the portion of our class consisting of individual consumers would be entitled to automatic treble damages under the current RICO act, and underneath the new RICO act as well. However, there are a great number of business users in Minnesota who were affected by these same acts of bribery in the same way as consumers. The small businessperson who has been victimized by intentional criminal activity should recover as much as the individual. I see no logical reason to separate these two. In fact, amongst our named plaintiffs are two small business people who have been directly injured by Northwestern Bell's activities. They should be compensated as well.

3.(a) Why do you feel state law is inadequate to protect the people of Minnesota.

The state law in Minnesota did not provide for a civil cause of action based upon common law bribery or upon the criminal act of bribery. Likewise, a Minnesota statute barred a cause of action based on unjust enrichment. Those were the only state law causes of action that could be brought against the telephone company for civil recovery. We attempted to bring these in state court and the complaint was dismissed by the district court and affirmed on appeal. H.J. Inc. v. Northwestern Bell Corporation, 420 N.W.2d 673 (Minn. App. 1988).

Subsequent to the alleged acts of bribery, a new Public Utilities Commission overturned one of the rates set by the Commission that was alleged to have been bribed. They lowered that particular rate by some ten million dollars per year. It was affirmed on appeal, with the appellate court finding that there were adequate facts to support claims that Northwestern Bell had "tainted" the quasi-judicial proceedings of the Public Utilities Commission. (Matter of Public Utilities Commission, 417 N.W.2d 274 (Minn. App. 1987). You would think that there would be nothing more to receive a refund wouldn't you? Wrong! First, Northwestern Bell said that the new commission had no right to reopen its prior finding, even if there was tainting involved. They lost that on appeal, and the United States Supreme Court refused to hear the matter. They are now arguing that even if the prior commission had the right to reopen the rate, and even if the prior commission found that that rate was excessive due to acts of tainting by Northwestern Bell, the new commission can only set the rate prospectively - in other words no one can collect the illegal monies already taken in by Northwestern Bell. This position is outrageous. That case is currently being fought in the state courts between the attorney general and Northwestern Bell.

3(b) Is the state law inadequate because the treble damages and attorneys' fees are available under RICO?

No, state laws are inadequate because, as you can see, from the above description in 3(a), this Federal RICO lawsuit appears to be the only cause of action by which Minnesota telephone customers can recoup their losses.

3(c) Isn't it true that Minnesota can enact treble damages private rights of actions for bribery and fraud with attorneys fees if it chose to do so? Why should this kind of fraud be in the Federal courts?

It is true that Minnesota can enact such legislation. However, I believe it is far easier for the federal government ~~to~~ enact such legislation. The reason is that a state legislature, when confronted by giant corporations such as Northwestern Bell, do not have the freedom from intimidation which is present in the federal government. These giant corporations can influence state legislators to a much greater extent then they can the independent senators of the United States. It is not unusual that the federal government has to take the lead in matters which may be difficult for state legislatures to handle -- for example the federal antitrust laws, the civil rights laws, etc.

4. Do you advocate a Federal treble damages fraud statute?

Yes I do. However, I do believe that before we can impose treble damages upon any individual or business, we must ensure that it has been a pattern of criminal activity - in other words two or more acts which show intent to have injured. If we don't have treble damages, what is to prevent the business from occasionally resorting to fraud when first the changes of getting caught are slight, and secondly, even if they do get caught, they only have to give back part of what they gained? It seems that reason dictates an individual must have a punishment for an intentional business fraud. This is particularly compelling when one looks at the scandals taking place on Wall Street and in the commodities markets.

To say that these fraud issues can be adequately handled by Federal and State prosecutors is ludicrous. Michael Milken's annual salary was more than the entire amount allotted for SEC enforcement in a year. Complex fraud litigation often requires resources that government agencies such as attorneys general and county attorneys may be unable to provide. Our firm has spent thousands of dollars and thousands of hours in prosecuting the H.J. Inc. case alone. Bringing a RICO case is no easy task either financially or the amount of hours that need be invested. As noted by Kevin Jost in his article, The Fraudulent Case Against RICO, California Lawyer, May 1989 at p. 51, the amount of witnesses and time consumed is enormous. Mr. John Jost states that the attorney hours spent in one RICO case by four members of a San Francisco law firm amounted to 11,000 hours during the five years the suit was pending. The firm deposed thirty witnesses, analyzed almost l00,000 pages of documents obtained in discovery, and drafted numerous pretrial motions and responded to massive interrogatories by the two defendants. At trial, it presented 24 witnesses, 174 exhibits. The trial consumed two and one half months. Even after the verdict, the firm had to contend with an appeal in determining the size of the final settlement. Most federal and state prosecutors either do not have the time to prosecute some of these large cases, or would have to limit their prosecution to only several large cases a year.

For this reason a federal treble damages fraud statute would be helpful in that it at least reimburses the plaintiff for the monies lost as well as encourages private litigation so that these cases can be pursued vigorously by both government and private attorneys.

QUESTIONS BY SENATOR THURMOND

1. With regard to pending cases, do you feel that the language in this proposal is adequate to allow continued pursuit of treble damages for meritorious RICO actions? Why or why not?

I do not believe that the language in the proposal allows the continued pursuit of treble damages in some meritorious cases. As you know, I am representing a putative class of Minnesota telephone users in a case alleging bribery of the Public Utilities Commission by Northwestern Bell. Most of this case will not be affected by the retroactivity aspects of the new bill, because my clients are, on the majority, individual private consumers. However, many of my clients - I estimate approximately l/3 of total telephone users, are businesses. Many of these are small business people who have paid illegally high phone bills. Why should a small business be unable to collect the same amounts that a private consumer could collect?

The treble damages in the RICO law was not put there solely for the benefits of those injured - it was also put there to deter further actions by the wrongdoers. Clearly, a removal of the treble damages provision would remove the incentive to avoid violating the law. As you know, treble damage cases under the antitrust laws are normally settled at close to the actual damages lost. Study of the Antitrust Treble Damage Remedy, serial no. 8, House Committee on the Judiciary, 98th Cong., 2d Sess. 14 (1984). Other cases, where only actual damages are allowed to be collected, are normally settled well below what is really lost. This is inappropriate where the defendant's behavior was, as is necessary in RICO actions, actually criminal in nature. By this I mean it was intentional wrongdoing designed to benefit themselves at the expense of another person or a third party.

2. Along with any effort to amend RICO, do you feel that it is appropriate to require a standard of more culpability for the award of punitive damages?

Senator, I do not agree that including malice is necessary here. Remember, RICO is a statute that bases its civil cause of action on criminal-like activity. If an individual has committed intentional acts - intent is required in all predicate acts brought under RICO - damages automatically flow. It is reasonable that multiple damages should be awarded here, as the intent required in performing the actions, whether defined as malice or not, indicates deliberate and thoughtful activity. Such activity is clearly more onerous than simple negligence.

Furthermore, there is no reason to increase the evidentiary standard from preponderance of the evidence for single damages to a standard of clear and convincing evidence for multiple damages. As you are aware, the antitrust statutes allow a treble damage remedy. Specifically both the Sherman Act and the Clayton Act provide for treble damages if the statute is violated. The standard of evidentiary proof is preponderance of the evidence in determining whether the statute has been violated. Therefore treble damages also use this standard. There is no reason to single out RICO to change a standard that has been used for a long time in other statutes in awarding treble damages.

Furthermore, studies under the antitrust act show that most treble damage suits are settled at close to the actual damages incurred by the plaintiff. Study of the Antitrust Treble Damage Remedy, serial number 8, House Committee on the Judiciary, 90th Cong., 2d Sess. 14 (1984). Plaintiffs in antitrust actions do not receive any windfall damages. It appears that the antitrust legislation has worked very efficiently. There is no reason why it should not work in RICO.

3. How do you respond to the assertion by the Department of Justice in their testimony last year that there was a pressing need for civil RICO reform because the statute was being abused by private plaintiffs?

First Senator I simply cannot agree with the Department of Justice assertion that the statute is being abused by private plaintiffs. Apparently RICO's critics take great delight in giving examples of "abusive" litigation. Many charges have been leveled that there is an abuse in RICO litigation. However, there does not appear to be a great deal of substantiation for such charges. Furthermore, those making charges regarding abuse fail to take into account any of the remedies available against such abuse.

As pointed out by Professor Robert Blakey, 5 Civil RICO Report, June 20, 1989 at 6, those who make such charges have the burden of proof to show that a substantial number of abusive RICO suits are being filed; that existing remedies are not adequate to resolve this issue; that additional safeguards cannot be designed; and that the detriment of these suits outweigh the good that comes from the legitimate suits. Professor Blakey charges that none of these burdens have been met.

Indeed, Professor Blakey addresses a recent list of 53 cases produced by the Business/Labor Coalition for Civil RICO Reform that are termed "abusive". Professor Blakey notes that the cases were filed between December, 1979, and January, 1988. During that time approximately 1,910,520 cases were filed in the federal district courts. Of that number approximately 2,742 were RICO filings, therefore these "abusive" cases amounted to only .003% of total filings. Id. For a detailed comment on these cases which show that such charges are unfounded, see Id. at 7-14. Such cases clearly do not support any charges that RICO is being abused. The fact is, however, judges have succeeded in routinely dismissing spurious RICO complaints from their courtrooms. A recent survey, by Andrew B. Weissman, Executive Director of the ABA's 1985 RICO Task Force and a RICO critic, demonstrates this point. Mr. Weissman states that during the statute's lifetime, 2/3 of the 1,820 written decisions were either dismissals or summary judgments for the defendants. Kevin Jost, The Fraudulent Case Against RICO, California Lawyer, 49, 50 (May 1989). Thus, it is clear that any abuse of litigation is being weeded out immediately by the courts themselves.

In addition, the courts have numerous other methods in dealing with any frivolous or abusive litigation. However, it may well be that courts do not consider or have not been using them to their fullest.

> Judge Hunter stated that the subcommittee on judicial improvements. . .had explored ways and means to reduce frivolous or meritless litigation in the courts and had canvased the various courts for ideas and suggestions.

> After consideration of the suggestions received, the subcommittee concluded, as did many judges, that the existing tools are sufficient, but perhaps not fully understood or utilized.

Report of the Proceedings of the Judicial Conference of the United States, September 21-22, 1983, at 56. As stated, there are numerous ways to deal with abusive litigation. First of all, all attorneys are bound by ethical principles which prohibit the initiation of baseless litigation. Model Code of Professional Responsibility DR7-102(A)(1)(1982) (attorney subject to discipline for intentionally harassing or malicious suit.); DR7-102(A)(2) (attorney may not knowingly advance the claim or a defense that is unwarranted by existing law unless based on a good faith argument for extension, modification, or reversal). Litigation abuse is also tortious. W. Prosser, Torts 119-21 (4th Ed. 1971).

In addition to these initial ethical considerations of bringing the suit, abusive litigation is also subject to sanctions under the Federal Rules of Civil Procedure. Numerous rules apply: Fed. R. Civ. P. 9(b) (fraud must be pleaded with particularity); Fed. R. Civ. P. 11 (sanctions for failure to investigate the facts or the law in bringing a case); Fed. R. Civ. P. 12(b)(6) (authorizes dismissals on motions for failure to state a claim upon which relief can be granted); Fed. R. Civ. P. 12(f) (courts may strike scandalous matter); Fed. R. Civ. P. 16 (request for a pretrial conference geared towards court elimination of frivolous claims); and Fed. R. Civ. P. 56 (timely motion for summary judgment). See also, Christianburg Garment Company v. EEOC, 434 U.S. 412, 419 (1978) (award of fees to defendant permitted for bringing an action which was frivolous, unreasonable or without foundation.)

Courts however have been willing to use the existing tools to sanction those plaintiffs bringing actions they consider abusive. See, e.g., Farguson v. MBank Houston, NA., 808 F.2d 358, 360 (5th Cir. 1986) (Rule 11: imposing monetary sanctions and an injunction against further frivolous litigation); Spiegel v. Continental Ill. National Bank, 790 F.2d 638, 650-51 (7th Cir. 1986) (Rule 38: sanctions applied to RICO); Bush v. Rewald, 619 F. Supp. 585, 604-06 (D. Haw. 1985) (Rule 11: counsel fee award due to failure by plaintiff to investigate RICO facts); WSB Electric Company v. Rank and File Comm.to stop the 2-gate sys., 103 F.R.D. 417 (N.D. Cal. 1984) (award of $6,125 in attorney's fees to defendants); Financial Federation Inc. v. Ashkannazy, (1984) Fed. Sec. L. Rep. (CCH) para. 91, 489 (D.C. Cal. 1983) vacated and remanded, 742 F.2d 1461 (9th Cir. 1984), reinstated in unpublished opinion, ($150,000 awarded in legal fees under Rule 11 for frivolous RICO claim.)

Adequate sanctions do exist to prevent RICO abuse. At any rate, it is not a reflection upon the law if abusive cases are litigated, it is a comment upon the judiciary. See Hoover v. Ronwin, 104 S.Ct. 1989, 2012 (1984) (Steven, J., dissenting) ("Frivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine. Our legal system has developed procedures for speedily disposing of unfounded claims; if they are inadequate to protect [individuals] from vexatious litigation, then there is something wrong with those procedures, not the law.")

It follows then that if there is abuse, sanctions should be placed on the abuser.

To simply change RICO so as to allow intentional criminal activity to go without multiple damages because of unproven abuse by some, is to throw the baby out with the bathwater. There has been a great good brought about by civil RICO actions - no one ever talks about the monies which have been returned to people following RICO cases. Of course, in the vast majority of those situations, the people are just ordinary citizens, and do not have the ability to undertake huge and expensive efforts to amend a statute. The way the present statue is being amended - retroactively - smacks of special interest treatment. In fact, removing the treble damages for the securities interest and the commodities interest, especially when one can hardly pick up a newspaper without reading of another fraud in those areas, is very questionable indeed.

Senator DeConcini. Dr. Blakey, your name has been used a great deal here. I think it is time that you get a fair chance to respond, and we thank you for being here. You are a noted——

Mr. Blakey. I wonder whether I am the defendant.

Senator DeConcini. No, you are not the defendant. You are an outstanding professor of law and we welcome you here.

Mr. Blakey. Thank you, Mr. Chairman.

Senator DeConcini. We want to give you an opportunity to respond to those, myself included, who have made reference to your statement. I did read your statement.

STATEMENT OF G. ROBERT BLAKEY, WILLIAM J. AND DOROTHY O'NEILL PROFESSOR OF LAW, UNIVERSITY OF NOTRE DAME SCHOOL OF LAW, NOTRE DAME, IN

Mr. Blakey. My name is G. Robert Blakey. I am the William J. and Dorothy O'Neill Professor of Law at the Notre Dame Law School. My appearance here today, however, is personal. Nothing I say should be attributed to Notre Dame or to anyone else with whom I am associated.

And I might add, Mr. Chairman, that I have worked with the judicial conference in training RICO. I have worked with Federal prosecutors. I have represented defendants in criminal RICO cases, and I have represented both plaintiffs and defendants in civil RICO cases. But my appearance here today is personal.

Like Mr. Feinberg, I return to this committee. I was the chief counsel who worked with Senator McClellan when this statute was originally enacted. I have also worked for Chairman Biden. I guess that means that I am able to work with people on both sides of the ideological perspective.

As a personal note, Mr. Chairman, I would say that if I were a U.S. Senator, I could probably give both you and Mr. Hatch my vote and let you cast it for me blindly, simply delegate it to you—9 times out of 10, you would have cast it correctly for me. Unfortunately, I am here today——

Senator DeConcini. This is No. 10. [Laughter.]

Mr. Blakey. I am unfortunately here today to discuss No. 10.

Indeed, I find it sort of uncomfortable to say, on the one hand, people like yourself and myself who have associated themselves with crime control for so long and worked for victims of crime and, on the other hand, some of my friends on the committee who characterize themselves as liberals and have spoken so strongly for victims in other contexts, the little person, or indeed have spoken out against white collar crime—that there isn't a consensus here to strengthen this bill, I find, paradoxical.

The drive to amend RICO is fueled by unjustifiable myths, half-truths, and stale data. My full statement, which I would ask that you incorporate in the record, deals with that in detail.

Senator DeConcini. They all will be incorporated.

Mr. Blakey. Indeed, I have also recently prepared a detailed study of the 53 cases offered as abusive cases by the coalition. It turns out if their case rests on those 53 cases, their case is in deep trouble.

And I would hope that if all of the Senators can't review that study that the staff would. If their case rests on those 53 cases, it doesn't work, and the details are laid out—the statistics are laid out in the study, and I would ask that you take a look at it.

I point out two cases in it just as an example of the inadequate preparation of the list. Two things are often said. One is that this statute is not used against the mob. In fact, one of the 53 cases that they allege is an abusive case is an example of a union member suing a mob-dominated union.

The second is they have indicated that it is inappropriate in other areas. Another case that they have listed as abusive is a situation where a widow and her children went to a union to obtain their death benefit, about $1,800. The person who ran it asked her for sexual favors and a kickback. The coalition presents this as an abusive case.

What they don't tell you—and this is my point—what they don't tell you is that man was, in fact, convicted for racketeering, debarred from that union, and among the elements in the counts against him was the abuse of this woman. What you are being asked to look at are not, in fact, abusive cases, if you will study them.

Let me check off, if I can, for you, Mr. Chairman, some specific comments, however, on your bill.

Senator DECONCINI. Let me just state, Mr. Blakey, that I am glad to have your observation and review of those 53 cases because, as you know, we didn't get them until this morning, so we haven't had a chance to look at them.

Mr. BLAKEY. I understand.

Senator DECONCINI. And I welcome that, quite frankly.

Mr. BLAKEY. Mr. Chairman, if you have any questions, please send them to me. I was doing my best to do that study.

Senator DECONCINI. I may have some. I do want to ask, I can't remember, if one of those cases is the one that Mr. Harrison had this morning from the West Virginia bank?

Mr. BLAKEY. No, it was not.

Senator DECONCINI. I would like to, quite frankly, ask you to look at that case——

Mr. BLAKEY. I would be glad to.

Senator DECONCINI [continuing]. Both those cases, from your perspective, because I think you want to be objective here. But that one really bothered me immensely—both of them, the one that he won and the one that he didn't.

Go ahead, sir.

Mr. BLAKEY. Mr. Chairman, I note that we have had a dialog in here on my time. I wonder if you could give——

Senator DECONCINI. We will extend that time, I can assure you. [Laughter.]

Mr. BLAKEY. They applaud the addition to RICO of new crimes of violence. I applaud, too, the new fraud predicates, but the bill omits the single most important new fraud predicate—to wit, bank fraud. In light of the savings and loan scandals on every main street in the Nation, no valid reason can be offered for its exclusion.

I would also recommend to you that you clarify the inclusion of fraud in the sale of securities to be specifically the crimes in that area and not the civil provisions, and that you also include hazardous waste.

In light of the commodity fraud scandals in New York and Chicago, I recommend the express inclusion of violations of the Commodities and Exchange Act.

I would add only one other point at this place. If RICO is to be made applicable civilly to violent crime groups as well as organizations that engage in patterns of criminal fraud, two additional changes are necessary.

We must expressly include in RICO some ability to freeze assets in that period of time between the filing of the complaint and the judgment. If we don't, this statute will be only effective against white collar offenders. The fly-by-night people who will take the assets and run before the case is over with cannot be covered.

In addition, if we are to have it applicable to violent groups, we must eliminate some of the Federal jurisprudence that indicates it is not applicable unless it is economically-motivated conduct.

Today, this Nation is plagued by fraud in financial institutions—banks, thrifts, insurance companies, welfare and pension funds, securities dealers, and other similar institutions. They are, moreover, failing at unprecedented rates.

All of the governmental and journalistic studies of these failures agree that a substantial portion of these failures is attributable not to bad management or poor economic conditions, but to out-and-out fraud. Swindlers have, in short, inflicted untold harm on these financial institutions.

Various governmental insurance programs, as you have noted in your questions, Mr. Chairman, back up these institutions, including the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, the National Credit Administration, the Pension Benefit Guaranty Corporation, and the Securities Investor Protection Corporation. State insurance commissioners play a similar role at the State level for insurance companies.

Ultimately, therefore, the taxpayers will have to pick up the tab for most financial institution fraud. History will not be kind to the authors of S. 438 and its supporters to the degree that the Government entity provisions of this bill do not permit those guarantee corporations to sue for triple damages, not only for injury to the Government itself, but also to the insured industry.

And to the degree that that is true and this bill is retroactive, it is, in effect, a bail-out for the savings and loan swindlers, the people who have already cheated, and we are going to have to come up with $40 to $100 billion. There are current claims——

Senator DECONCINI. Now, when you say a bail-out, you mean a bail-out——

Mr. BLAKEY. For the swindlers.

Senator DECONCINI. No. Let us just clarify that. You mean a bail-out—you don't mean that there would be no criminal charges available to be filed against them. You are saying that the treble damages, if this were retroactive, would not be there. Is that what you are saying?

Mr. BLAKEY. A little of both, Senator. In fact, the Federal 5-year statute of limitations is running or has already run on most of this fraud.

Senator DECONCINI. Well, how do you know that?

Mr. BLAKEY. Well, because it runs——

Senator DECONCINI. The GAO study that I have seen says some of it is very current, particularly as these banks and savings and loans were in trouble just in the last 6 months or a year before they were taken over.

Mr. BLAKEY. That is true, but most of this fraud ante-dates the statute of limitations. Indeed, in the——

Senator DECONCINI. Well, I would like to see the proof of that.

Mr. BLAKEY. Okay. Well, the administration, as you know, Senator, is asking in its legislation that the criminal statute of limitations be extended in order that they have an opportunity to investigate and prosecute this.

Senator DECONCINI. I understand that, but I mean any facts that you have that most of this is already prohibited by the statute, I would welcome that.

Mr. BLAKEY. Well, I have said a good deal of it, but the other part of it is if the FDIC comes in and sues—and they can under current law either as a liquidator or as a Government corporation—they get triple damages. If this bill passes as it is currently written and includes its retroactivity provisions, those people who are currently subject to triple damages because of fraud will, in fact, walk out with actual damages.

Senator DECONCINI. Well, yes, and criminal action could still be available.

Mr. BLAKEY. On some, yes.

Senator DECONCINI. Okay, fine, but I just wanted to make the clarification. It sounded as though there would be no action available toward anybody who might have done anything criminal.

Mr. BLAKEY. No. I am speaking principally of the civil consequences.

Senator DECONCINI. Okay, thank you.

Mr. BLAKEY. Unjustifiably, too, the State insurance commissioners are completely excluded. They have pending cases, and I will leave it to my good friend, Commissioner Long, to comment on that.

I also find it paradoxical the exclusion of Indian tribes and tribal organizations from Government-related suits, particularly so in light of the Indian fraud scandals now being uncovered by you, Senator.

These provisions have the effect of taking new money out of taxpayers' pockets and leaving stolen money in the pockets of swindlers, and those lawyers, accountants, and others who are in league with them.

No showing has been made that these Government-related suits are abusive. When the taxpayers of this Nation find out what this bill did to them, the retribution will be swift; it will also be fully deserved.

The lowering of the measure of damages from triple to actual for most RICO suits will lessen the deterrent impact of the statute. Triple damages are swift, certain, and severe; actual damages are not.

Since actual damages do not include opportunity and transaction costs, it will leave victims of patterns of criminal behavior less than whole. That, too, is unjust and indefensible.

More than 119 Federal statutes, moreover, authorize the granting of counsel fees to a prevailing party. Why exclude the victims of patterns of criminal behavior from that list? The bill last year didn't. I see no reason to exclude it from the bill this year.

Senator DECONCINI. Did you support the bill last year?

Mr. BLAKEY. I have not had an opportunity personally to testify on that bill.

Senator DECONCINI. To review the bill, okay.

Mr. BLAKEY. No, no. Indeed, I worked for Mr. Conyers and Mr. Rodino in the House, and sat and negotiated for them, not as a principle but as an agent, a compromise bill. And I will tell you, frankly, what I have told other people, that I recommended that the compromise be accepted not as the best bill, but a good bill.

Senator DECONCINI. That was what is known as the Conyers bill last session?

Mr. BLAKEY. No, no. It was a proposed compromise worked out.

Senator DECONCINI. That was never put into legislation?

Mr. BLAKEY. No. Mr. Conyers objected to it on three grounds—retroactivity and the securities and commodities exclusion exemption. I had recommended to him that he accept it. He did not, and therefore the bill didn't go forward.

Senator DECONCINI. You recommended retroactivity and the exclusion of securities?

Mr. BLAKEY. As part of a compromise last year, I did.

Senator DECONCINI. Thank you. Go ahead. Do you want to finish up, please?

Mr. BLAKEY. Little or no justification exists for the general exclusion of securities or commodities fraud from multiple-damages provisions of the revised statute. Nothing that is now going on in New York or Chicago warrants special treatment for these industries.

An appropriate definition of "pattern" will keep routine cases confined to the securities or commodities Act. The Supreme Court will shortly provide it in the *H.J., Inc.* appeal. If not, this committee should. Aggravated fraud belongs in RICO.

I applaud the inclusion of personal injury for crimes of violence, but little or no warrant is present for shifting from triple damages to actual damages, plus punitive damages on clear and convincing evidence, when such injuries occur. Allegations of abuse focus on commercial litigation, not crimes of violence. Why lessen protection for victims of crimes of violence?

Mr. Chairman, I have some technical comments on the question of the criminal provisions section.

Senator DECONCINI. Let me ask that you submit those.

Mr. BLAKEY. I will submit them for the record.

Senator DECONCINI. I thank you for that. Let me ask you a couple of questions. Now, we are going to look at the review of the 53 cases, or 51, whatever it is; I am very interested in that.

Is the Suffolk County case that Mr. Feinberg mentioned—is that one of them?

Mr. BLAKEY. No, that was not drawn to—the 53 cases are the ones that coalition brought up.

Senator **DeConcini**. I know, and I couldn't remember if that is in there.

Mr. **Blakey**. It is not.

Senator **DeConcini**. Would you be so kind as to look at that case for me?

Mr. **Blakey**. I have, Senator.

Senator **DeConcini**. If you care to——

Mr. **Blakey**. I would suggest to you that it is a close call. As Mr. Feinberg indicated, I think that that will probably be affirmed, and it will be affirmed under present law. There is a general Federal doctrine called primary jurisdiction; that is to say, if there is the parallel tort in an administrative agency, Federal courts defer to the agency to handle it.

This is not something that has to be specifically drafted in RICO. It is applicable to RICO, and whether——

Senator **DeConcini**. You mean any judge could easily—if this is affirmed, you think that is going to be the precedent and the rule that any judge, when there is a regulatory agency, will throw out a RICO charge?

Mr. **Blakey**. Well, if this is a proper case to be classified as primary jurisdiction, that is the right result. The argument on this appeal will not be about primary jurisdiction or RICO. It will be whether this is a case for primary jurisdiction.

Senator **DeConcini**. Sure, sure.

Mr. **Blakey**. As Mr. Feinberg described it to you, it was a rate case.

Senator **DeConcini**. Yes.

Mr. **Blakey**. But if we had heard from the plaintiffs in that case, it was a fraud case.

Senator **DeConcini**. Right.

Mr. **Blakey**. That is the argument and that will always be there.

Senator **DeConcini**. I would appreciate your observation of that case, as well as the ones I mentioned to you, the First Community Bancshares, the two cases there.

Mr. **Blakey**. Let me end with two comments that are not in my paper, but I think it is important to respond to. One is the very troublesome issue that Senator Grassley raised, and that is the interaction between any of these suits and first amendment rights.

Unfortunately, I see nothing in the proposed bill that will mitigate that, and I will be perfectly willing to draft for you some language that would specifically respond to the first amendment concerns. My suggestion, frankly, to you is that just as you have a speech and debate clause that prohibits you from being called to answer in another body for what you do here, there is no reason why we couldn't write into RICO a provision that if we are dealing with protected conduct under the first amendment that that conduct be neither discovered nor proved in a civil case.

Senator **DeConcini**. Well, I welcome any suggestions.

Mr. **Blakey**. That will take the first amendment right out of RICO, but there is nothing in this bill that would do that. One of the troublesome parts I have with the bill is it doesn't seem——

Senator **DeConcini**. Well, I don't think the bill was designed to do that. The bill was designed to deter someone from bringing such litigation because they happened to disagree with their political agenda on a nuclear freeze demonstration or something.

Mr. **Blakey**. I am not sure that we can get out of Federal courts that kind of litigation by repealing RICO, much less modifying it.

Senator **DeConcini**. Well, we are not talking about repealing RICO. We are talking about reforming or modifying it, right?

Mr. **Blakey**. Correct. The second suggestion that I would have is that I associate myself with the AFL-CIO's position. I think the *Texas Air* case is abusive, but unfortunately nothing in this bill will deal with it. My recommendation to you would be that you put in a specific clause that says during and in the course of a labor dispute, neither a plaintiff nor a defendant can bring a RICO case.

Senator **DeConcini**. That may be a good suggestion, but as you heard the AFL-CIO, Mr. Dubester indicated that he thinks it does have a real chilling effect and that it is very detrimental.

Mr. **Blakey**. If you couldn't bring them at all——

Senator **DeConcini**. Do you disagree with his testimony?

Mr. **Blakey**. No, no, no. I agree with him.

Senator **DeConcini**. Yes, I do, too.

Mr. **Blakey**. I think that in the normal, everyday collective bargaining, RICO has no place to play.

Senator **DeConcini**. So, to me, you are arguing in favor of some reform, some substantial reform.

Mr. **Blakey**. Absolutely, Senator. I have never said that this bill was chiseled in stone and cannot or ought not be reformed. My problem is I don't see a correspondence between the problems being identified and the legislation going forward.

If we would carefully tailor the reforms to the abuses—that is, I am afraid that what is happening is the baby is going out with the bath water.

Senator **DeConcini**. Well, I think that is a good argument from your position. Of course, that is not the intent of the drafters of this bill. We attempted to be specific and address the abuses and not throw away the baby, and that is just a difference of opinion. But I welcome any suggestions you would care to submit to us.

Mr. **Blakey**. Senator, let me end with one comment. I really began this—and I meant it when I said I could give you blindly my vote and 9 times out of 10 you would cast it the same way I would.

What is so troublesome for me about this—and may I be utterly candid with you?

Senator **DeConcini**. Certainly.

Mr. **Blakey**. When I worked here for Senator McClellan and drafted legislation, I did it at his instructions. He told me what to do and I executed it. No bill that I came in contact with for the 5 years that I was here—and we passed a number of bills—other than administration bills was drafted other than by the Senators and the staff.

What I find most troublesome about this bill is the degree to which it has been drafted outside of the committee.

Senator **DeConcini**. Well, I was here when Senator McClellan was here, too.

Mr. **Blakey**. You remember that?

Senator **DeConcini**. Well, no, I don't remember that at all. I remember that Senator McClellan—the respect I had for him—was interested in any constituent. He would take legislation from people. I remember giving him legislation to look at. You weren't here then, but somebody on his staff looked at it. I don't know if he read it or not. He talked to me about it later.

He didn't ever exercise or raise any objection to the fact that someone might have drawn this outside of my staff. Maybe he didn't know that I didn't sit down and write it, but I have a pretty good feeling he did know that.

Mr. BLAKEY. The second part of it, Senator, is I am told by the people who are pushing the bill that this is, in fact, a done deal.

Senator DECONCINI. What do you mean, it is a done deal?

Mr. BLAKEY. That is to say that this bill, in fact, is not open to amendment to working out these kinds of details.

Senator DECONCINI. Well, I hate to refute that. That is the purpose of these hearings, and though I may not agree with everything that has been said in opposition to the bill because I feel very strongly about it, some very good suggestions have been made by Mr. Twist and others here.

I don't know whether or not I will agree with them, or if you submit language dealing with labor unions, I don't know whether I will agree with that. But I am more than happy to work with you.

Mr. BLAKEY. Well, Senator, let me say this.

Senator DECONCINI. If this is a done deal—I am sure it is a done deal for the coalition in favor of it. In their mind, they think it is a done deal. They want to see it passed and they are very much in favor of it.

Mr. BLAKEY. Well, Senator, then this trip of Washington was worth it.

Senator DECONCINI. Well, I would hope so, Mr. Blakey. [Laughter.]

I mean, I didn't ask you to come here just to show that we can be objective and have some opposition. You are here because of your reknown in the field. You know, we all have biases, we all have opinions on these things.

But to come here and leave the record that you think this is a cooked deal and that whatever you say really doesn't have any impact is not the case, even though that is what you may believe.

Mr. BLAKEY. Senator, I didn't say I believed it. I said this was what I was told, and I am——

Senator DECONCINI. Well, who told you that? Who told you that?

Mr. BLAKEY. I would be glad to provide the names to you confidentially, Senator. I don't think it would be appropriate to do it on the record.

Senator DECONCINI. Okay.

Mr. BLAKEY. If, in fact, we are going to look at it line by line and try to arrive at a workable compromise, let me say I would be glad to do anything I could to help you draft it and explain whatever the alternatives might be.

Senator DECONCINI. Yes. Let me just offer to you now that you submit your suggestions. I welcome them. But does that mean I am going to take them, and if I don't take them, does that mean it is a cooked deal? Not in my mind. That may be your reaction to it.

But I welcome your suggestions. You have a longstanding background in this area and other areas, as do some other members here in this hearing. But to leave the charge on the table, that the press may jump on, that this is a cooked deal and that this hearing was just done to walk through it is really an insult to me and to the Judiciary Committee and the process, in my opinion, sir.

Mr. **Blakey**. I am glad it is clarified, Senator. Ed Baxter and I know each other. I will be in contact with him with the materials.

Senator **DeConcini**. I will be glad to work with you.

Mr. **Blakey**. And I look forward to the opportunity to work for you. I might add that I recommended things to Senator McClellan from time to time and he didn't take them either.

Thank you, Senator.

Senator **DeConcini**. Thank you.

[The prepared statement of Mr. Blakey and response to questions follows:]

[June 7, 1989]

Testimony
of
Prof. G. Robert Blakey
on

S. 438
The RICO Reform Act of 1989

United States Senate
Committee on the Judiciary
(Study of Allegations of Litigation Abuse)

Introduction[*]

On February 23, 1989, Senator Dennis DeConcini and Congressman Rick Boucher introduced S. 438/H.R. 1046, "The RICO Reform Act of 1989." 135 Cong. Rec. S. 1652-57 (daily ed. Feb. 23, 1989) The bill is offered as a reform of RICO, Title IX of the Organized Crime Control Act of 1970, which would end alleged "litigation abuse" by private civil plaintiffs. In fact, however, the proposed legislation would, in large measure, set aside the right of victims injured by criminals to obtain adequate civil redress. Drafted at the request of representatives of the securities and commodities industries and the accounting profession, the proposed legislation, in most litigation under the 1970 Act, would:

(1) reduce the measure of damages from treble to actual damages,

(2) eliminate the provision for counsel fees for a prevailing party,

(3) exclude the securities and commodities industries from the scope of the 1970 Act, and

(4) apply its provisions retroactively to pending litigation.

Similar, but less restrictive, legislation failed to pass in the 100th Congress because it was widely perceived to be special interest legislation. Congressman John Conyers, a principal spokesman for those who opposed the legislation, aptly observed:

> [I]n light of the current scandals on Wall Street, I believe that it is wholly unjustifiable to treat securities or commodities fraud in any fashion different from, say, insurance or bank fraud. I see no valid reason why aggravated patterns of criminal behavior in the securities or commodities industries do not merit RICO's enhanced sanctions. I see no ground, in short, for a double standard.
>
> Similarly, I believe that it would be profoundly unwise, wholly inappropriate, and constitute both a troubling and unseemly precedent to make RICO reform retroactive so as to restrict the measure of recovery in pending cases.

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[*] The able assistance of Thomas A. Perry (Notre Dame '91), Joseph E. Bauerschmidt (Notre Dame '91), Mary K. Hartigan (Notre Dame '91), and Bernardo M. ~~Garcia (Not~~re Dame '91) in the preparation of these materials is acknowledged.

> I see no reason to give the likes of Boesky or Butcher in their stock fraud or bank fraud activities a special bill of relief. Congress sits to legislate, not settle pending litigation.

134 Cong. Rec. E3720 (daily ed. Oct. 21, 1988) (remarks of Rep. John Conyers).

A need exists both to fine-tune and strengthen RICO, but as the *N.Y. Times* of Oct. 6, 1988, at 19, col. 1, editorially observed:

> Reducing damages would reduce deterrence. It makes no sense to exempt commodities and securities frauds when these seem rampant. Above all, retroactive relief is unfair. By going along with it, Congress would turn itself into a partial substitute for impartial courts.

Unless it is substantially amended, the "RICO Reform Act of 1989" ought not pass the 101st Congress.

Background of 1970 Act

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as the "Racketeer Influenced and Corrupt Organizations Act" (RICO), 18 U.S.C. § 1961 *et seq.* Congress enacted the 1970 Act "to strengthen [. . .] the legal tools in the evidence gathering process, . . . [to] establish [. . .] new penal prohibitions, and [to] provide [. . .] enhanced sanctions and new remedies . . . . " 84 Stat. 923. Among other things, Congress was concerned about "fraud." *Id.* at 922. In addition to fraud, RICO covers violence, the provision of illegal goods and services, corruption in labor or management relations, and corruption in government. Congress found that "the sanctions and remedies available" under prior law were "unnecessarily limited in scope and impact." 84 Stat. 923. It then provided treble damage relief for "person[s] injured" in their "business or property" by violations of the statute. 18 U.S.C. § 1964(c).

At the time, the private civil remedies of the 1970 statute had been called for by no less than the President, ("Message on Organized Crime," *reprinted in*, Hearings before the Subcommittee on Criminal Laws and Procedures, U.S. Senate Committee on the Judiciary, 91st Cong., 1st Sess. 449 (1969) (*Senate Hearings*), the President's Commission on Crime and the Administration of Justice, (*The Challenge of Crime in a Free Society* 208 (1967)), and the American Bar Association. *Senate Hearings* at 259; Hearings before Subcommittee No. 5, House Committee on the Judiciary, 91st Cong., 2d Sess. 537 (1970). In response, the Senate passed the bill 73 to 1. 116 Cong. Rec. 972 (1970). The

House passed an amended bill 431 to 26. Id. at 35,363. The Senate then passed the House bill without objection, and the President signed the legislation on Oct. 15, 1970. Id. at 36,296; 37,264.

Application of 1970 Act Beyond Organized Crime

The "legislative history [of RICO] clearly demonstrates that . . . [it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." Russello v. United States, 464 U.S. 16, 26 (1983). "[T]he major purpose of Title IX . . . [was] to address the infiltration of legitimate business by organized crime." United States v. Turkette, 452 U.S. 576, 591 (1981). But "Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises." Turkette, 452 U.S. at 590. "[R]ejected [also has been the] notion [that RICO] applies only to organized crime in the 'classic mobster' sense." United States v. Grande, 620 F.2d 1026, 1030 (4th Cir.), cert. denied, 449 U.S. 919 (1980). See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 (1985) ("not just mobsters"); Owl Construction Co. v. Ronald Adams Contractor, Inc., 727 F.2d 540, 542 (5th Cir. 1984), cert. denied, 469 U.S. 831 (1984) ("[C]ourts and . . . commentators have persuasively and exhaustively explained why . . . RICO . . . [is not limited to] organized crime . . . .") The legislative history of the 1970 statute is replete with statements by the bill's sponsors that fully demonstrate that they intended that it apply beyond organized crime. See, e.g., 116 Cong. Rec. 35,204 (1970) (remarks of Rep. Robert McCory, a House floor manager of RICO):

> [E]very effort . . . [was] made [in drafting RICO] to produce a strong and effective tool with which to combat organized crime--and at the same time deal fairly with all who might be affected by . . . [the] legislation--whether part of the crime syndicate or not.

Legitimate businesses, in short, "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences." Sedima, 373 U.S. at 495. Finally, "the courts [are also] all but unanimous in their refusal to read RICO as prohibiting only the infiltration of legitimate organizations . . . ." United States v. Altomare, 625 F.2d 5, 7 n.7 (4th Cir. 1980) (emphasis added). See Turkette, 452 U.S. at 590 ("unpersuaded . . . only the infiltration of legitimate business") (emphasis in original). As such, RICO fits well into a consistent pattern of federal legislation aimed at a particular target, but not limited in application to that target. See, e.g., 18 U.S.C. § 1951 (extortion) held not limited to "racketeering" in United States v. Culbert, 435 U.S. 371, 373-74 (1978); 18 U.S.C. § 1952 (Travel Act) held not limited to "organized crime bribery" in Perrin v. United States, 444 U.S. 37, 46 (1979); 18 U.S.C. § 1953 (lottery tickets) held not limited to "organized crime" in United States v. Fabrizio, 385 U.S. 263, 265-67 (1966); 18 U.S.C. § 2113(b) (bank robbery) held not limited to "gangsters" in Bell v. United States, 462 U.S. 356, 358-62 (1983); 18 U.S.C. § 2421 (1982) (white slave traffic) held not limited to "commercial prostitution" in Caminetti v. United States, 242 U.S. 470, 485-90 (1917).

Implementation of RICO

At first, the Department of Justice moved slowly to use RICO criminally. Today, it is the prosecutor's tool of choice in organized crime, political corruption, white-collar crime, terrorism, and neo-Nazi and anti-Semitic hate-group prosecutions. See Oversight on Civil RICO Suits, Hearings Before the Senate Committee on the Judiciary, 99th Cong., 1st Sess. 109-11 (1985) (testimony of Assistant Attorney General Stephen Trott) (Trott). The Department of Justice is also implementing the civil provisions. Id. at 116-17 (litigation against mob-controlled unions reviewed).

The private bar did not begin to bring Civil RICO suits until about 1975. When it did, the district courts reacted with hostility and undertook judicially to redraft the statute in an effort to dismiss civil suits in all possible ways. See Horn, Judicial Plague Sweeps United States 'Result Orientitis' Infects Civil RICO Decisions, 5 Nat'l. L.J., May 23, 1983, at 31, col. 1. Indeed, before Sedima, 61% of the reported decisions were dismissed on various motions of defendants. Trott at 127.

The first effort to redraft Civil RICO involved reading into it an "organized crime" limitation. Because that limitation had no support in the text of the statute--it was specifically rejected in the legislative debates--the Second, Fifth, Seventh and Eighth Circuits quickly rejected it. Alcorn County Miss. v. U.S. Interstate Supplies, 731 F.2d 1160, 1167 (5th Cir. 1984) (cases cited). The next effort involved reading a "competitive injury" limitation into the statute. The Seventh and Eighth Circuits quickly turned this effort aside. Schacht v. Brown, 711 F.2d 1343, 1356-58 (7th Cir.), cert. denied, 464 U.S. 1002 (1983) (the organized crime limitation "revived under . . . [a new] guise"); Bennett v. Berg, 685 F.2d 1053, 1058-59 (8th Cir. 1982), aff'd on rehearing en banc, 710 F.2d 1361 (8th Cir.), cert. denied, 464 U.S. 1008 (1983). Then, the district courts hit upon the "racketeering injury" and the criminal conviction limitations. Both limitations, adopted by a sharply divided

Second Circuit, were repudiated in Sedima.[1] The attention of those who wanted to modify, if not repeal, Civil RICO then turned to Congress.

The Civil Enforcement Mechanism

18 U.S.C. § 1964(c) provides:

> Any person injured in his business or property by reason of a violation of [RICO] . . . may sue therefor in any appropriate United States district court and shall recover threefold the damages sustained and the cost of the suit, including a reasonable attorney's fee.

The private enforcement provisions of RICO were modeled on, but are not identical to, the antitrust laws. S. Rep. No. 617, 91st Cong., 1st Sess. 81 (1969); H.R. Rep. No. 1549, 91st Cong., 2d Sess. 56-60 (1970). The antitrust laws have been aptly termed "the Magna Carta of free enterprise." United States v. Topco Associates, 405 U.S. 596, 610 (1972). The antitrust laws "are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." Id. A private "treble-damages remedy [is needed] . . . precisely for the purpose of encouraging private challenges to antitrust violations." Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (emphasis in original). Such "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." Leh v. General Petroleum Corp., 382 U.S. 54, 59 (1965). Private suits "provide a significant supplement to the limited resources available to the Department of Justice" to enforce the antitrust statutes. Reiter, 442 U.S. at 344.[2]

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[1] The Second Circuit suggested in Sedima that Civil RICO suits against "respected and legitimate enterprises" were "extraordinary, if not outrageous." Sedima S.P.R.L. v. Imrex Co., Inc., 741 F.2d 482, 487 (2d Cir. 1984), rev'd., 473 U.S. 479 (1985). Included among the cited legitimate enterprises was E.F. Hutton, But see, Business Week, Feb. 24, 1986, at 98, col. 1 (Hutton pleads guilty to 2000 counts of mail fraud multiple-million dollar bank scam); Haroco, Inc. v. Am. Nat'l Bank and Trust Co., 747 F.2d 384, 395 n.14 (7th Cir. 1984), aff'd., 473 U.S. 606 (1985) ("[T]he white collar crime alleged in some RICO complaints against 'legitimate' businesses is in some ways at least as disturbing . . . ."). Those who make such remarks are apparently unaware of the substantial body of literature on white-collar crime by so-called respected businesses. See, e.g., Ross, How Lawless Are Big Companies, Fortune, Dec. 1, 1980, at 57 (1043 major corporation between 1970-1980: 117 convictions or consent decrees for 98 antitrust violations; 18 kickbacks, briberies or illegal rebates; 21 illegal political contributions; 11 frauds; and 5 tax evasions).

Like the antitrust laws, RICO creates "a private enforcement mechanism that . . . deter[s] violators and provide[s] ample compensation to the victims . . . . " Blue Shield of Virginia v. McCready, 457 U.S. 465, 472 (1982). See Agency Holding Corp. v. Mally-Duff & Assocs., Inc., 483 U.S. 143, 151 (1987) ("private attorneys general [for] a serious national problem for which public prosecutorial resources are deemed inadequate")' Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 241 (1987) ("vigorous incentives for plaintiffs to pursue RICO claims")' Sedima, 473 U.S. at 493 ("private attorney provision . . . designed to fill prosecutive gaps") (citing Reiter v. Sonotone, 442 U.S. at 344).[3]

Allegations of Abuse

Until the recent investigation and indictment of Michael R. Milken, former head of Drexel Burnham Lambert Inc.'s junk bond operations, on 98 counts of RICO and criminal securities fraud for cheating his clients,[4] the public controversy over efforts to modify RICO largely focused on its private civil enforcement mechanism; it now includes its criminal sanctions.

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[2] In fact, between 1960 and 1980, of the 22,585 civil and criminal cases brought under the antitrust provisions by the government or private parties, 84% were instituted by private plaintiffs. U.S. Department of Justice Source Book of Criminal Justice Statistics 431 (1981). Professor (now Judge) Posner also argues on economic grounds forcefully for private enforcement of more than actual damages awards against all forms of deliberate antisocial conduct, particularly where the factor of concealment is present. R. Posner, Economic Analysis of Law 462 (private enforcement), 143, 272 (more than actual damage awards, for deliberate conduct) 235 (concealment) (2d ed. 1977).

[3] RICO and the antitrust statutes are well integrated. "There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power." C. Kaysen & D. Turner, Antitrust Policy 17 (1959). RICO focuses on the first two; antitrust focuses on the third. See also American C & L Co. v. United States, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting) ("Restraint may be exercised through force or fraud or agreement."). See generally Note, Treble Damages under RICO: Characterization and Computation, 61 Notre Dame L. Rev. 526, 533-34 (1986) ("(1) encourage private citizens to bring RICO actions, (2) deter future violators, and (3) compensate victims for all accumulative harm. These multiple and convergent purposes make the treble damage provision a powerful mechanism in the effort to vindicate the interests of those victimized by crime.").

RICO authorizes the criminal forfeiture of ill-gotten gains and the interest of an offender in an enterprise run corruptly. United States v. Porcelli, 865 F.2d 1352, 1354-66 (2d Cir. 1989) (forfeitures upheld, but subject to 8th Amendment proportionality). It also authorizes the issuance, on a proper showing, of pretrial restraints or the posting of a bond to prevent the dissipation before verdict of assets subject to forfeiture. United States v. Regan, 858 F.2d 115, 120-22 (2d Cir. 1988)

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[4] Benjamin Stein, Barron's, Apr. 3, 1989, p. 24, col. 1, summed up the charges against Milken:

> Michael Milken has been charged with a variety of crimes. But almost all of them had a common theme--the perversion and betrayal of principals by agents, the abuse of those who placed their trust by those in whom they placed their trust . . .
>
> The capitalist system, which has done so well for most Americans, is based on the notion that principals can trust their agents . . . . If that trust is a joke, then the whole system is handicapped, not least by investors reluctance to invest.
>
> But according to the indictments . . . Milken and his co-indictees took advantage of the trust placed in them as agents by their corporate principals . . . . [C]orporate officers brought him plans for acquisitions and restructurings, all on promise of confidence. Over and over again, Milken bought stock and tipped friends to buy stock in the targets, according to the indictments.
>
> Those buy orders moved the stock price upwards, often raising the takeover price to his own clients by tens or hundreds of millions of dollars. Conversely, those trades made millions for Milken and his pals . . . Milken made money personally by violating his client's trust and thereby cost his clients, his principals, large bucks . . .
>
> Milken, . . . made himself the principal in a great many cases in which he had been hired to be the agent. This is a basic attack on the credibility of the system, which cannot function without trust between principals and agents, especially at that exalted level.

(restraint or bond upheld). Such pretrial remedies are a common feature of civil litigation. See, e.g., Republic of Philippines v. Marcos, 863 F.2d 1355, 1359, 1361 (9th Cir. 1988) (injunction upheld to prevent dissipation of assets); Int'l Control Corp. v. Vesco, 490 F.2d 1334, 1347 (2d Cir.) (injunction upheld to prevent impairment of assets), cert. denied, 417 U.S. 932 (1974); United States v. Brodson, 241 F.2d 107, 117 (7th Cir. 1957) (tax lien pretrial upheld despite effect of tying up funds), cert. denied, 354 U.S. 911 (1957).

The Milken indictment seeks a $1.85 billion in forfeitures from Milken and his co-defendants. N.Y. Times, Mar. 30, 1989, at 1, col. 1. If found guilty, Milken's illegal earnings will have been exceeded only by those of Al Capone. Wall Street Journal, Mar. 31, 1989, at 1., col. 4. Milken has agreed to post a bond of $700 million in cash and other assets to secure his portion of the forfeiture and to post bail in the amount of $1 million. N.Y. Times, Apr. 15, 1989, at 1., col. 1. Drexel itself has agreed to plead guilty to securities fraud and pay $650 million in fines and sanctions. Id. While Drexel publicly protests that it was unfairly forced to plead guilty, because of fear that pretrial restraints would put it out of business, it privately told its employees that, if indicted under RICO, it would "have the opportunity to post a bond to forestall any pretrial restraint, [which] will permit us to continue operations." Wall Street Journal, Feb. 15, 1989, at 1, col. 1. It also informed the United States District Court that its plea will be "voluntary." Wall Street Journal, Mar. 31, 1989, at A4, col. 6 ("voluntarily and without coercion").

Newspaper columnists decry RICO's pretrial restraints as an unconstitutional interference with the presumption of innocence. See Wall Street Journal, Feb. 15, 1989, at 1, col. 1 (commentary of William Safire and others analyzed and criticized). In fact, individual defendants, on a proper showing, may be detained in jail before trial consistent with the constitution. See, e.g., United States v. Salerno, 481 U.S. 739 (1987). It is doubtful that greater pretrial rights should be afforded property than liberty. Such columnists are also apparently ignorant of the usual features of civil litigation. Nevertheless, those who seek to reform RICO are not moving to alter its criminal provisions. N.Y. Times, Mar. 12, 1989, at 2C, col. 1 (Rep. Boucher: "[T]here is no sentiment to limit RICO on the criminal side.").

The charges against the use of RICO in the civil context were, until recently, just that: charges. Now, however, the coalition of those seeking to undermine RICO has produced a list of cases that it terms "abusive." Since the coalition has been in existence for almost four years--and it is richly financed--it is fair to assume that these cases represent the most egregious examples that time and money could find of "litigation abuse" under RICO. As such, the coalition's overall position against Civil RICO may be fairly said to stand or fall on the basis of this list. Nevertheless, when it is carefully analyzed and researched, it does not warrant the enactment of the "RICO Reform Act of 1989." In fact, the list indicates that little relationship exists between the allegations of abuse and the suggested evisceration of RICO. The allegations of abuse may, therefore, be appropriately termed a smoke screen behind which special interests are seeking to enact laws for their private benefit.

To summarize the coalition's allegations and a careful analysis of them, the coalition has produced a list of 53 cases it terms "abusive." The first case was filed in December, 1979. The last case was filed in January, 1988. Between December, 1979 and January, 1988, approximately 1,910,520 cases were filed in the federal district courts.[5] Of that number, approximately 2742 were RICO filings.[6] These "abusive" cases, therefore, constitute only .003% of total filings, and 1.9% of the RICO filings.

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[5] The number of civil cases filed in the federal District Courts in the years 1980-1986 was found in Ann. Rep. of the Director of the Admin. Off. of the U.S. Cts., 1981-87, respectively.

The actual number of cases filed in 1987 had not yet been released at the time of this report. The figure for the total number of cases filed in 1987 was estimated by incrementally increasing the total number of cases filed in 1986 by 2.67%, to which was added the estimated number of cases filed in January, 1988. 1987 Ann. Rep. of the Director of the Admin. Off. of the U.S. Cts., at 3.

The figure for the total number of cases filed also includes those filed in December of 1979. This figure (approximately 13,539) was extrapolated from 1980 Ann. Rept. of the Director of the Admin. Off. of the U.S. Cts., at 3.

[6] The civil RICO filings between December, 1979 and January, 1988 were estimated by adding the total number of pre-Sedima filings to the total number of post-Sedima filings through January, 1988. There were 500 pre-Sedima filings. Oversight on Civil RICO Suits, Hearings before the Senate Judiciary Committee, 99th Cong., 1st Sess. at 127 (1985). There were 2242 filings between August, 1985 and January, 1988. Letters of Pamela D. Crawford, Civil Program Analyst, Administrative Office of the United States Courts, dated March 24, 1987 and May 12, 1989 to Professor G. Robert Blakey. Thus, the total of civil RICO filings between December, 1979 and January, 1988 was 2742.

Of these 53 cases, 53% had an independent basis for federal jurisdiction. These cases, as well as the general data,[7] do not establish that RICO filings are of floodgate proportions or are wholly new.

Of the 53 "abusive" cases, none represented a judgment for money damages. None was brought by government related entities. Only 2 were brought by charitable organizations. Only 2 were against accountants, one of the professions that is a moving force in the coalition. Only 4 included securities allegations. None was a commodities case.

The charges of litigation abuse totally ignore the presence, in current law, of more than adequate remedies against such abuse, not only under RICO, but other federal statutes and related claims for relief. Indeed, it is this absent recognition that is the most telling point against the Civil RICO critics' charges of litigation abuse.

Those who would rewrite RICO have the burden of proof to show--

1. that a substantial number of frivolous or otherwise abusive RICO suits are being filed,
2. that existing safeguards against such suits are not adequate to remedy them,
3. that new safeguards adequate against such suits cannot be designed, and
3. that the detriment from these suits outweighs the benefit from legitimate suits.

None of these burdens have been met.

The "existing tools [to address frivolous litigation] are [in fact] sufficient, but perhaps not fully understood or utilized." Report of the Proceedings of the Judicial Conference of the United States Sept. 21-22, 1983 at 56. Ethical standards, for example, prohibit the assertion by "a lawyer . . . [of a] position in litigation that is frivolous." See, e.g., Model Code of Professional Responsibility EC 7-4 (1980). Such litigation abuse is tortious. W. Prosser, Torts §§ 119-21 (4th ed. 1971) (malicious prosecution, wrongful civil proceeding, abuse of process). It is also subject to sanctions under the

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[7] See Blakey, Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO be Effective Only Against White-Collar Crime?, 62 Notre Dame L.Rev. 526, 535 n.37 (1987).

Federal Rules of Civil Procedure: Fed. R. Civ. P. 9(b) (fraud must be pleaded with particularity); id. at 11 (sanctions for failure to investigate facts or law); id. at 12(f) (courts may strike scandalous matter); id. at 56 (summary judgment). See also Christianburg Garment Co. v. EEOC, 434 U.S. 412, 419 (1978) (award of fees to defendant permitted for actions frivolous, unreasonable, or without foundation). Indeed, these sanctions are being employed under RICO in proper circumstances. See, e.g., Farguson v. MBank Houston, N.A., 808 F.2d 358, 360 (5th Cir. 1986) (Rule 11: monetary sanctions imposed and injunction granted against further frivolous litigation).[8] The high cost of litigation itself erects a substantial barrier, not only in front of frivolous litigation, but also meritorious pleas. Contingent fee arrangements mitigate the issue of cost to the poor, but wronged individual; they also act, however, as a screening device, employed by counsel, who risk their own funds, that weed out cases, where liability is not sure and damages are not high.

The existing system is able to weed out inappropriate cases. Eighty-seven percent of the coalition's "abusive" cases were dismissed in whole or in part on one or more grounds. Thirty-two percent were properly dismissed on "pattern" grounds in such a fashion that they will not be refiled and similar cases should not appear in the future. Motions for sanctions were made in only 19% of the cases; they were granted in 8% (or 40% of the motions). As such, the defendants themselves apparently did not always believe the cases were frivolous. Many times, the early decisions did not grant the sanctions requested because the courts expressed doubt about the proper construction of the statute. Later cases, however, tend to include the granting of sanctions when they are requested. Ironically, the list of "abusive" cases actually includes a suit against an organized crime figure. See No. 52 infra. In addition, the list includes a suit against a figure, who had been charged and convicted for criminal behavior. See No. 45 infra. The cases, moreover, include clear instances of judicial abuse of the statute rather than litigant abuse. See e.g., No. 16 infra. In short, the case for RICO "abuse" has not been made. In fact, on close analysis, the existing system is seen to be working well.

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[8] See also Hoover v. Ronwin, 466 U.S. 558, 601 (1984) (Stevens, J., in dissent) ("Frivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine. Our legal system has developed procedures for speedily disposing of unfounded claims; if they are inadequate to protect [parties] from vexatious litigation then there is something wrong with those procedures, not the law.").

Detailed Comment on Cases[9]

1. Abernathy v. Erickson, 657 F.Supp. 504 (N.D.Ill. 1987) (No. 34)

Coalition Comment

An ex-wife brought a civil RICO action against her former husband for defrauding her of an interest in real property. The wife complained that she did not receive certain proceeds from the sale of property, a hunting lodge.

Analysis

The District Court properly dismissed the case for failure to allege a "pattern" and for failure to file within the statutory period. Such filings should not continue in the future. If they do, they should be subject to sanctions.

2. A.L. Lee Corp. v. SRE Carlsbad, Inc., Case No. 86 Civ. 6953 (JFK) (S.D.N.Y., March 28, 1988), reported in (CCH) RICO Business Disputes Guide Transfer Binder, Par. 6903 (No. 14)

Coalition Comment

The plaintiff, a coal mining equipment manufacturer, brought a civil RICO action against a business it was acquiring alleging fraudulent misrepresentations as to the marketability of the acquired business' products.

Analysis

The District Court properly dismissed the case for failure to allege "pattern." Such filings should not continue in the future. If they do, they should be subject to sanctions.

This case also suggests that the list of "abusive cases" was not developed through thorough investigation. The "abusive" list includes ten cases, of which this is one, that all appear on pages 7971 through 8054 of the RICO Business Disputes Guide Transfer Binder (1987-88).

3. American Soc'y of Contemp. Med. Surgery & Ophtholomogy v. Murray Communications, Inc., 547 F.Supp. 462 (N.D.Ill. 1982) (No. 35)

Coalition Comment

Civil RICO action arising from breach of contract dispute over the publication rights of two of the Society's medical journals.

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[9] The coalition's list is alphabetized in this list. The original number is in parenthesis. The citation to the case and "coalition comment" are quoted from the coalition's list.

Analysis

The District Court properly dismissed part of a RICO counterclaim, but properly upheld other aspects of it. Since a pattern of fraudulent withholding of moneys due was alleged, the counterclaim was partially valid. This case is not abusive.

4. ARK Travel, Inc. v. Travelers Int'l. Tour Operators, Inc., No. 84-623 (D.N.J.) 2 RICO Law Rep. 283 (Aug/Sept 1985) (No. 48)

Coalition Comment

The plaintiffs, individual travel agents, brought a civil RICO action against several tour packagers over a dispute concerning commissions owed by the tour packagers to the travel agents.

Analysis

The District Court properly upheld the fraud claims of travel agents, who were systematically swindled out of commissions. The Court also granted leave to amend the Complaint to allege fraud with more particularity. The litigation is hardly abusive.

5. Barker v. Underwriters at Lloyd's, London, 564 F.Supp. 352 (E.D.Mich. 1983) (No. 42)

Coalition Comment

Lloyd's of London and the Lincoln Insurance Company denied a claim under a fire insurance policy because they believed the fire had been set by one of the plaintiffs. The plaintiff brought a civil RICO action against both companies, alleging that "defendants [through the use of the mails] have engaged in a scheme to defraud by fraudulently refusing to pay claims without valid reasons in order to force persons to compromise their claims for an amount less than they are entitled to under the insurance policies."

Analysis

The District Court properly dismissed the case for a failure to allege "pattern" and for failure to plead fraud with particularity. Such filings should not continue in the future. If they do, they should be subject to sanctions.

Nevertheless, while this litigation may be thought to be inappropriate, it is not beyond the pale to consider that an insurance company could engage in a pattern of fraud that might be an appropriate subject for RICO litigation. See, e.g., Unocal

Corp. v. The Superior Court of Los Angeles, 198 Cal. App. 3rd 1245, 244 Cal. Reptr. 540 (2d Dist. 1988) (RICO fraud upheld: insurance company fraudulently intended to cancel directors and officers' liability policies at first sign of hostile takeover and to coerce insured into accepting replacement policy with higher deductibles, higher premiums, and exclusion of acts related to hostile takeover).

6. Battlefield Builders, Inc. v. Swango, 743 F.2d 1060 (4th Cir. 1984) (No. 44)

Coalition Comment

The plaintiff, a condominium developer, brought a civil RICO action against two purchasers of an office condominium and the two purchasers' wives, alleging the defendants were trying to "extort" an unreasonably high price from the developer in connection with the developer's effort to repurchase the property in order to include it in a block of units the developer wanted to sell to IBM. The district court had dismissed the claim, stating,

> "If its allegations are true, it might have an approved claim, but it is at best a garden-variety commercial breach of contract, perhaps fraud, even perhaps conspiracy . . . . But this is not what RICO was designed to remedy."

The Fourth Circuit overturned the district court's dismissal, concluding that the allegations might make out a claim of "extortion" under state law, and therefore ruled the developer could bring the RICO action.

Analysis

The District Court granted a motion to dismiss for failure to state a claim for relief holding that the activities had to be "racketeer" related. The Court of Appeals for the Fourth Circuit properly reversed on this issue.

Battlefield, however, no longer states the law. Today, this litigation would be dismissed on "pattern" grounds. See, e.g., Flip Mortg. Co. v. McElhone, 841 F.2d 531, 538 (4th Cir. 1988). As such, filings of this type should not continue in the future. If they do, they should be subject to sanctions.

7. Beauford v. Helmsley, 843 F.2d 103 (2d Cir. 1988) (No. 12)

Coalition Comment

The plaintiffs, tenants of an apartment building, brought a civil RICO suit against the developer, the develop's [sic] sales agent, and two engineering firms in connection with the conversion of their apartment building to a condominium.

Analysis

While the District Court and a panel of the Court of Appeals for the Second Circuit dismissed the RICO count for failure to allege a "pattern," on a rehearing en banc in Beauford v. Helmsley, 865 F.2d 1386, 1391 (2d Cir. 1989), the Court held its previous focus on the "continuity of the enterprise" was amiss:

> Since Congress's goal in fashioning its definition of "pattern of racketeering activity" was to exclude from the reach of RICO criminal acts that were merely "isolated' or "sporadic," we must determine whether two or more acts of racketeering activity have sufficient interrelationship and whether there is sufficient continuity or threat of continuity to constitute such a pattern. Accordingly, our analysis of relatedness and continuity has shifted from the enterprise element to the pattern element.

The Court first stressed that the mailings were made to 8,286 tenants and potential buyers. Several amendments were also made to the offering, which had included the original misrepresentations. It then appropriately concluded: "There can be no doubt that the thousands of alleged mail frauds here had the necessary interrelationship to be considered a pattern." 865 F.2d at 1392. Moreover, due to the vacancy rate, "there was reason to believe that similar fraudulent mailings would be made over an additional period of years." 865 F.2d at 1392. As such, Beauford cannot be fairly termed anything else but an example of a systematic fraud properly within RICO.

8. Bingham v. Zolt, 683 F.Supp. 965 (S.D.N.Y. 1988) (No. 20)

Coalition Comment

The plaintiff, the estate of famed Jamaican reggae performer Bob Marley, brought a civil RICO action against several of Marley's attorneys and accountants alleging fraudulent diversion of Marley's music companies from the estate.

Analysis

The case was properly dismissed by the District Court on "pattern" grounds. Such filings should not continue in the future. If they do, they will be subject to sanctions.

9. Bishop v. Corbitt Marine Ways, Inc., 802 F.2d 122 (5th Cir. 1988) (No. 37)

Coalition Comment

Plaintiff brought a civil RICO action over a dispute regarding repairs of a commercial fishing boat.

Analysis

This litigation was properly dismissed on the grounds that the Defendant was alleged to be the "enterprise." Filings of this type should not occur in the future. If they do, they should be subject to sanction.

10. Brayall v. Dart Industries, Inc., No. 87-1525-WF (D. Mass., April 2, 1987) reported in (CCH) RICO Business Disputes Guide Transfer Binder, Par. 6861. (No. 8)

Coalition Comment

Independent distributors of Tupperware products sued the manufacturer of Tupperware, Dart Industries, alleging Dart fraudulently induced plaintiffs to become Tupperware distributors.

Analysis

This litigation is not abusive. The fraud consisted of "cult-like" indoctrination techniques, which misstated the income and business gain available to distributors. Originally brought in state court, the Defendant removed it to a federal district court. The RICO claim was temporarily stayed, pending the outcome of an injunction request and state claims, which had been remanded to state court. The District Court itself observed, "[a]lthough the defendants have moved to dismiss the RICO claim, it cannot be said that the claim is obviously without merit."

11. Bruce Church, Inc. v. United Farm Workers, No. CV-F-84-231REC (1986) reprinted in 3 RICO Law Rep. 723 (May 1986) (No. 4)

Coalition Comment

Agricultural business brought a civil RICO suit against Cesar Chavez, the United Farm Workers Union (UFW), their attorneys and strike coordinators, alleging that the UFW, along with the other defendants, had induced the California Agricultural Labor Relations Board to issue fraudulent complaints against the business.

Analysis

The District Court properly dismissed the complaint for failure to plead fraud with particularity.

12. Christian Populist Party v. Secretary of State, 650 F.Supp. 1205 (E.D.Ark. 1987) (No. 30)

Coalition Comment

Plaintiffs brought a civil RICO action against the State of Arkansas challenging the Arkansas state election statute with regard to its filing deadlines and petitioning requirements.

Analysis

The Plaintiffs, Ralph P. Forbes and the Christian Populist Party, alleged eight different claims against Defendants. The District Court properly dismissed all charges.

Ralph P. Forbes first gained notoriety as a captain in George Lincoln Rockwell's American Nazi Party. Most recently, he was the campaign manager for David Duke, former Grand Wizard of the Knights of the Ku Klux Klan, in the 1989 Louisiana House of Representatives election. In 1986, too, he filed a lawsuit on behalf of Jesus Christ, minor children and himself against Satan, various governmental units, the Russellville School district, and a state education official to stop Halloween in the schools. That case, too, was properly dismissed.

Accordingly, this litigation has little or nothing to do with RICO, civil or criminal. People like Mr. Forbes will file frivolous claims for relief no matter what the law is. The proposed reform, therefore, will do nothing to deter Mr. Forbes from filing another claim under RICO or any other theory.

13. Church of Scientology v. Armstrong, (D.C.Cal. July 16, 1985), reported in 1 Civil RICO Rep. at 2 (BNA), July 24, 1985) (No. 39)

Coalition Comment

The plaintiff, the Church of Scientology, brought a civil RICO action against former church members, alleging they conspired to steal church scriptures for their personal financial benefit and were "perverting" the scriptures' texts.

Analysis

This case is part of the same litigation as Religious Technology Center v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987). Defendants stole certain scriptures and higher level materials from Church offices in Copenhagen, Denmark. Danish officials later convicted them of burglary. These materials were acquired by the Church of the New Civilization and allegedly used by the competing "New Church" to lure away adherents and to spiritually and financially damage the Church. Wollersheim denied the Church injunctive relief under Civil RICO. The Church refiled in Religious Technology Center v. Scott, 660 F.Supp. 515 (C.D.Cal. 1987), alleging the scriptures were trade secrets with economic value. The District Court denied the application. The Church appealed and properly prevailed in Religious Technology Center v. Scott, 869 F.2d 1306 (9th Cir. 1989).

This litigation is hardly abusive. It is the kind of suit that could be brought for treble damages under the proposed reform legislation. It strikes at the sort of extensive fraud RICO was designed to redress. The Defendants travelled across the globe to burglarize the Church. They were convicted of crimes in a foreign country. They then set up a competing enterprise with the burglarized material seeking fraudulently to induce patrons to seek spiritual guidance at the "New Church" instead of the Church for their financial benefit. As Joseph Yanny, an attorney in the litigation aptly observed: "[It] proves that Scientology can receive justice in the courts without putting its religious beliefs on trial." Civil RICO Report July 24, 1985 at 2.

14. Compton v. Ide, 732 F.2d 1429 (9th Cir. 1984) (No. 36)

Coalition Comment

Plaintiff brought a civil RICO action against the Federal Bureau of Investigation and individual FBI agents and others in connection with the investigation and arrest of the plaintiff which led to his conviction for illegal possession of a dangerous weapon.

Analysis

Plaintiff filed several federal claims, including a RICO claim. The RICO claim was properly dismissed under the statute of limitations. It took the Court of Appeals for the Ninth Circuit only three paragraphs to dispose of the RICO charges.

The RICO claim was also subject to dismissal on "pattern" grounds. As such, filings of this type should not continue in the future. If they do, they should be subject to sanctions.

Further, Federal law enforcement officers, acting in an objectively reasonable fashion, are immune from federal and state criminal prosecution. See, e.g., Baucom v. Martin, 677 F.2d 1346 (11th Cir. 1982) (FBI agent not subject to state prosecution for bribery for participation in sting operation). Civilly, it is a matter of an immunity that must be examined case by case. Compare Nixon v. Fitzgerald, 457 U.S. 731 (1982) (President has absolute civil immunity) with Butz v. Economou, 438 U.S. 478, 504-08 (1978) (Secretary of Agriculture has qualified immunity). Where officers act outside of their immunity, no valid objection exists to criminal or civil litigation against them under RICO or other statutes or claims for relief. Compare United States v. Ehrlichman, 546 F.2d 910 (D.C.Cir. 1976) (civil rights convictions upheld for unlawful burglary of office of doctor by White House personnel) with Halperin v. Kissinger , 807 F.2d 180

(D.C.Cir. 1986) (complaint properly alleged civil claim for relief for unlawful wire tap by government officials). See infra No. 31.

15. Conan Properties, Inc. v. Mattel, Inc., 619 F.Supp. 1167 (S.D.N.Y. 1985) (No. 1)

Coalition Comment

Conan Properties brought a civil RICO action against Mattel alleging copyright infringement by Mattel of its fictitious character "Conan the Barbarian."

Analysis

The District Court properly upheld claims and counterclaims for fraudulently misusing copyright materials. Leave was granted to both parties to amend their pleadings. Subsequently, both parties abandoned their RICO claims; the other claims remain in court. Conan Properties, Inc. v. Mattel, 1989 W.L. 38581 (S.D.N.Y. April 18, 1989). It is hard to see how this is abusive litigation.

16. Condict v. Condict, 815 F.2d 579 (10th Cir. 1987) (No. 7)

Coalition Comment

A brother brought a civil RICO action against his mother and brother alleging that they had tried to wrest control of the family's 25,000-acre Wyoming ranch from him, and deprive him of any of the proceeds from the ranch's operation.

Analysis

The District Court improperly dismissed the Complaint on the grounds of a lack of a connection to "organized crime." By the time of the appeal, the Court of Appeals for the Tenth Circuit had decided Plains Resources Inc. v. Gable, 782 F.2d 883, 885-86 (10th Cir. 1986), in which the Court held:

> [N]either RICO nor Colorado Organized Crime Control Act (COCCA) requires [plaintiff] to plead a connection between defendant's activities and organized crime. . . . We are persuaded by the opinions which have held that there is no such requirement in a civil setting.

The Court, however, dismissed the Complaint on a different ground: failure to allege a "pattern." Nevertheless, the opinion is not a proper construction of the statute. Contrary to Plaintiff's Complaint, which alleged a claim for relief under Section 1962(b), which prohibits the takeover of an enterprise by a pattern of racketeering activity, the Court reached its judgment under Section 1962(c). It held that no "pattern" was present, since only a single scheme was alleged. Such a holding virtually reads Section 1962(b) out of the statute. See United States v. Ianniello, 808 F.2d 184, 192 (2d Cir. 1986) ("requiring two schemes to establish pattern would effectively eliminate" § 1962(b)). It is likely that the Supreme Court will shortly reject the Tenth Circuit's reading of "pattern" in the H.J., Inc. appeal (cert. granted 56 U.S.L. W. 3622, 3647) (U.S. March 22, 1988)). As such, Condict is a better illustration of judicial abuse of RICO rather than a litigant's abuse of the statute.

17. Congregation Beth Yetzhuk v. Briskman, 566 F.Supp. 555 (E.D. N.Y. 1983) (No. 52)

Coalition Comment

The plaintiff, a Chassidic Jewish congregation, filed a civil RICO suit against other members of the congregation over a dispute concerning the proper succession to the "Skolyer Rebbe", the religious leadership position within the congregation.

Analysis

The correct spelling of the Plaintiff's name is "Congregation Beth Yitzhak".

The District Court improperly dismissed the RICO claim on the grounds of a lack of an "organized crime" allegation.

The District Court probably should have dismissed it on First Amendment grounds. See, e.g., Jones v. Wolf, 443 U.S. 595 (1979). It is doubtful, too, that a "pattern" could be properly alleged. Filings of this type should not continue in the future. If they do, they should be subject to sanctions.

18. Cory v. Standard Federal Savings Bank, Civ. No. 87-3767 (4th Cir., March 31, 1988), reported in (CCH) RICO Business Disputes Guide Transfer Binder, Par. 6902 (No. 13)

Coalition Comment

The plaintiff, an individual bank depositor, brought a civil RICO action against a bank for the bank's alleged fraudulent underpayment of interest on the plaintiff's "T-bill Plus" account.

Analysis

The case was properly dismissed by the District Court because the Plaintiff failed to establish a "pattern." The Fourth Circuit Court of Appeals believed this case to be so insignificant that it affirmed the dismissal without publishing its opinion. 843 F.2d 1386. Filings of this sort should not continue into the future. If they do, they should be subject to sanctions.

19. Creative Bath Products v. Connecticut General Life Ins. Co., 837 F.2d 561 (2d Cir. 1988) (No. 9)

Coalition Comment

A partnership brought a civil RICO action against Connecticut General alleging that the insurance company's agent made three false representations in order to induce the partnership to purchase four life insurance policies for its officers.

Analysis

The District Court properly dismissed the Complaint for a failure to allege "pattern" and the Second Circuit Court of Appeals affirmed. As such, filings of this type should not continue in the future. If they do, they should be subject to sanctions.

20. District Telecommunications Dev. Corp. v. Dist. Cablevision, Inc., No. 85-2348 (D.D.C.), reported in 2 RICO Law Rep. 249 (Aug-Sept 1985) (No. 41)

Coalition Comment

The plaintiff, a disappointed bidder of a cable television franchise, brought a civil RICO action against the successful bidder of the franchise.

Analysis

The Federal Supplement citation is: Dist. Telecommunications v. Dist. Cablevision, Inc., 638 F.Supp. 418 (D.D.C. 1985).

The Court improperly dismissed the case because it held that the Plaintiff lacked cognizable injury.

The decision represents a view of RICO that would deny defense contractors standing to sue for a systematic pattern of obtaining defense contracts through fraud. As such, it is inconsistent with the better view. See, e.g., Environmental Tectonics v. W.S. Kirpatrick, Inc., 847 F.2d 1052, 1067 (3rd Cir. 1988). It is, therefore, a better illustration of judicial rather than litigant abuse.

21. Erlbaum v. Erlbaum, Fed. Sec. L. Rep. (CCH) 98,772 (E.D.Pa. 1982) (No. 43)

Coalition Comment

The Plaintiff, a divorced wife, brought a civil RICO action against her ex-husband because she believed he had not lived up to his part of the property settlement.

Analysis

The District Court dismissed this case because the Plaintiff was not a "purchaser or seller" under section 10b-5 of the securities statute.

The decision was wrongly decided on this issue. See infra No. 26. The case probably should have been dismissed on "pattern" grounds.

22. Eveland v. Director of Central Intelligence Agency, 843 F.2d 46 (1st Cir. 1988) (No. 16)

Coalition Comment

The plaintiff, challenging the conduct of U.S. foreign policy in the Middle East, brought a civil RICO action against the CIA and its director, William Casey, in which various current and former government officials, including Henry Kissinger, Robert MacFarlane, Richard Helms, George Schultz, and others were served.

Analysis

The Court of Appeals for the First Circuit properly dismissed the claim for relief. The First Circuit used the case to state clearly that RICO is not a tool for resolving "political differences." Future similar cases should result in sanctions.

The sort of litigation abuse illustrated by this case, however, is not RICO-specific. All legislation is exposed to it. Individuals, who believe litigation can resolve all their personal dissatisfactions, will seek to use any legislation on the books. It is doubtful that even the repeal of RICO would prevent this sort of litigation from being brought in the future.

23. Flip Mortgage Corp. v. McElhone, 841 F.2d 531 (4th Cir. 1988) (No. 10)

Coalition Comment

A mortgage company brought a civil RICO action against the officers and directors of a computer services firm alleging fraudulent breach of a contractual arrangement to share revenues generated by from [sic] computerized mortgage-related services.

Analysis

Flip Mortgage Corp. brought Civil RICO charges against the directors of Shamrock Computer Services (SCS) for multiple counts of fraud over a seven year span. The District Court dismissed the RICO count on "pattern" grounds. The Fourth Circuit Court of Appeals affirmed.

It is doubtful, however, that this construction of "pattern" is correct. If multiple frauds occurred over a substantial period of time, a "pattern" should have been found. See, e.g., Liquid Air Corp. v. Rodgers, 834 F.2d 1297, 1303 (7th Cir. 1987). This decision is a better illustration of judicial abuse than litigant abuse.

24. Flip Side Productions v. Jam Productions, Ltd., 843 F.2d 1024 (7th Cir. 1988) (No. 19)

Coalition Comment

The plaintiff, a Chicago rock concert promoter, brought a civil RICO action against another local rock promoter, the Village of Rosemont, Illinois, and the University of Illinois, alleging a RICO conspiracy to exclude the plaintiff from the University of Illinois' arena by operation of an exclusive lease for the arena which allegedly operated to prevent rock performers appearing at the University's arena from discovering that defendant promoter was charging artificially high promotional fees.

Analysis

Certiorari was denied at 109 S.Ct. 261 (1988).

The litigation was properly dismissed on "pattern" grounds and sanctions of $42,496.25 were properly imposed. This case well-illustrates the Seventh Circuit's position on abusive RICO claims; they will not be tolerated, and will be sanctioned. Far from illustrating litigation abuse that requires the rewriting of RICO, this case illustrates how well the present system is working.

25. Hunt v. Weatherbee, 626 F.Supp. 1097 (D.Mass. 1986) (No. 24)

Coalition Comment

The plaintiff, a female carpenter's apprentice, brought a civil RICO action against officers of a union local and a superintendent of a construction company alleging a pattern and practice of sex discrimination and sexual harassment.

Analysis

This case is not abusive. Instead, it well-illustrates how RICO can be used to redress wrongs that may be difficult to redress otherwise. Here a labor union systematically sexually harassed and subjected Hunt to extortionate behavior until she was compelled to leave her work. RICO provided an apt remedy to a wronged person.

26. International Data Bank, Ltd. v. Zepkin, 812 F.2d 149 (4th Cir. 1987) (No. 53)

Coalition Comment

The plaintiffs, outside investors, filed a civil RICO suit against the owners of a firm for including a fraudulent statement in the stock prospectus for the firm.

Analysis

The case was dismissed because Plaintiffs' lack of "standing" to recover under Section 10b-5 of the securities statute.

The Court of Appeals for the Fourth Circuit, however, was incorrect in applying civil instead of criminal standing elements to the Civil RICO claim. See, e.g., Warner v. Alexander Grant & Co., 828 F.2d 1528, 1530-31 (11th Cir. 1987); United States v. Newman, 664 F.2d 12, 15-20 (2d Cir. 1981). The Court also dismissed the case for lack of "pattern." It may be on better ground legally on this aspect of the decision.

27. Jerome v. SmithKline Beckman Corp., 842 F.2d 208 (8th Cir. 1988) (No. 11)

Coalition Comment

The plaintiffs brought a civil RICO action against a pharmaceutical company for damages for alleged personal injuries caused by use of a drug manufactured by the company.

Analysis

The District Court properly dismissed the RICO count, since personal injuries do not give rise to a claim for relief under RICO. In addition, since a crime of violence was not involved, the proposed RICO reform legislation, which would authorize recovery for personal injury in some situations, would not change this result. This type of litigation should not reoccur in the future. If it does, it should be subject to sanctions.

28. King v. Lasher, 527 F.Supp. 1377 (S.D.N.Y 1983) (No. 31)

Coalition Comment

The plaintiffs, beneficiaries of an estate and trust, brought a civil RICO action against the executrix and trustee of estate over the administration and distribution of the deceased's estate.

Analysis

Mrs. Lasher, the Executrix, properly recovered her attorney's fees from Plaintiff's counsel upon dismissal. The

Court found that the action was commenced in bad faith and without a factual basis.

It is possible that the claim could have been dismissed on other grounds. See C. Wright, Law of Federal Courts § 25 pp. 143-46 (1963) (inherent exceptions to jurisdiction).

29. K-N Energy, Inc. v. Gulf Interstate Co., 607 F.Supp. 756 (D. Colo. 1983) (No. 51)

Coalition Comment

The plaintiff brought a civil RICO action against a large shareholder to enjoin the shareholder from voting its shares at an annual meeting and from exercising any control over the plaintiff, alleging that the shareholder had obtained the common stock of the Plaintiff in violation of RICO.

Analysis

This case dealt with fraudulent filing of a Schedule 13(d) with the Securities and Exchange Commission. Section 13(d) requires a group acquiring more than 5% of the stock in a corporation to explain the intent of the group in acquiring the stock. The Court acknowledged that the Defendants had intentions beyond what the filed form indicated, but found no "pattern." In addition, the Court found that the claim should not be dismissed, and denied the Defendant's motion for summary judgment.

30. Kouvakas v. Inland Steel Co., 646 F.Supp. 474 (N.D.Ind. 1986) (No. 23)

Coalition Comment

The plaintiffs, a husband and wife, brought a civil RICO action against Inland Steel Company alleging that Inland officials conducted a pattern of racketeering by causing fraudulent invoices and other documents to be mailed to Inland Steel Company customers, and that Inland's harassment of plaintiff for refusing to participate in the pattern of racketeering activity caused plaintiff Spiro Kouvakas to become permanently disabled and caused plaintiff Judith Kouvakas the loss of consortium of her husband.

Analysis

This case was properly dismissed on summary judgment. RICO does not include personal injury claims.

31. Lightner v. Tremont Auto Auction, No. 82C-20090 (N.D.Ill. 1984) reported in 1 RICO Lit. Rep. 317 (Sept. 1984) (No. 3)

Coalition Comment

Civil RICO suit brought against FBI agents who orchestrated an undercover sting operation.

Analysis

The Federal Supplement citation is: Lightner v. Tremont Auto Action, 564 F.Supp. 1112 (N.D.Ill. 1983).

Two FBI agents were charged with violating RICO and the civil rights statute through their scheme to enter disguised stolen vehicles into the stream of commerce. The scheme was used to "sting" a ring of interstate auto thieves. Lightner was injured when he purchased stolen vehicles, two of which were repossessed from him, and two from the consumer. The District Court held that the RICO charges could not be dismissed on the basis of qualified immunity, since it could not be said as a matter of law that Defendants had the requisite good faith reasonable belief in the constitutionality of their scheme.

In Powers v. Lightner, 752 F.2d 1251 (7th Cir. 1985), the FBI agents appealed the issue of qualified immunity. The Court of Appeals for the Seventh Circuit first held that the order denying summary judgment was not immediately appealable; the resolution of the issue of qualified immunity would require a final judgment. In Powers v. Lightner, 820 F.2d 818 (7th Cir. 1987), the Court reversed itself in light of the Supreme Court's decision in Mitchell v. Forsyth, 472 U.S. 511 (1985), which held that such an order is an appealable final decision. The Court further held that the FBI agents were entitled to summary judgment on the grounds that federal agents had qualified immunity against civil suits that failed to allege criminal intent. Certiorari was denied by Lightner v. Jones, 108 S.Ct. 1057 (1988). Although the Court acknowledged that "it would be illogical to extend good faith immunity to a government official who has intentionally violated an individual's constitutional rights," the FBI agents did not violate Lightner's rights; it was merely the "fallout of the sting operation." 820 F.2d at 822. See supra No. 14. As such, the FBI agents were vindicated on appeal. Finally, the litigation is not RICO-specific. It could properly reoccur under the civil rights statutes, if FBI agents do not act in good faith.

Such litigation should not reoccur, or if it does, the ground rules under which it has to be resolved are settled.

32. Marks v. Pannell, Kerr & Forster, 811 F.2d 1108 (7th Cir. 1987) (No. 28)

Coalition Comment

The plaintiff, a former business partner, brought a civil RICO action against former partner and the partnership's accounting firm alleging that they had engaged in a pattern of racketeering activity by mailing false partnership tax returns to him, thus adversely affecting his tax liability for the year in question.

Analysis

Plaintiff had an expectation of in excess of $8,000,000.00 invested in various partnership arrangements. The District Court properly dismissed on "pattern." The Court of Appeals for the Seventh Circuit affirmed. As such, filings of this type should not occur in the future. If they do, they should be subject to sanctions.

33. Medallion TV Enterprises v. SelecTV of California, 627 F.Supp. 1250 (C.D.Cal. 1986) (No. 33)

Coalition Comment

The plaintiff, a joint venture partner, brought a civil RICO action against the former joint venture partner to recover losses sustained from lower than anticipated sales of the broadcast rights to a heavyweight prize fight between Muhammad Ali and Trevor Berbick.

Analysis

The correct citation is Medallion TV Enterprises v. SelecTV of California, 627 F.Supp. 1290 (C.D.Cal. 1986), aff'd., 833 F.2d 1360 (9th Cir. 1987).

The case was properly dismissed for failure to allege "pattern". As such, filings of this type should not continue in the future. If they do, they should be subject to sanctions.

34. Medical Emergency Service Associates v. Foulke, 844 F.2d 391 (7th Cir. 1988) (No. 18)

Coalition Comment

The plaintiff, a corporation providing medical staff provider [sic] to hospitals, brought a civil RICO action against four employee-physicians alleging they had fraudulently schemed to replace the corporation as the provider of emergency room services for a hospital.

Analysis

The Plaintiff's RICO claim for relief was dismissed because of a failure to allege "pattern." The District Court imposed sanctions on the Plaintiff for making inaccurate statements in his attempt to establish a "pattern." The Court of Appeals for the Seventh Circuit affirmed. This case well-illustrates how Rule 11 is working. It hardly justifies rewriting RICO on other issues.

35. Michaels Building Co. v. Ameritrust Co., N.A., 848 F.2d 674 (6th Cir. 1988) (No. 22)

Coalition Comment

The plaintiffs, two commercial bank customers, brought a civil RICO class action against six different banking groups and fifty individuals employed by or associated with the banks alleging overcharges in interest on various prime rate-based loans.

Analysis

This case does not illustrate litigation abuse. The Sixth Circuit Court of Appeals properly acknowledged the dilemma courts face in trying to distinguish between illegitimate claims and claims that have merit. The Court holds that there is a tension in the Federal Rules of Civil Procedure between Rule 8 (notice pleading) and Rule 9(b) (particularity pleading). The particularity requirement of Rule 9(b) cannot be viewed to undercut the "short and plain statement of a claim" provision in Rule 8. The two rules should be viewed in harmony. The Court finds, however, that the particularity requirement of Rule 9(b) must be read to give the Defendant fair notice of the substance of the Plaintiff's claim in order that the Defendant may prepare a responsive pleading.

Bank lending practices, if fraudulent, may be properly challenged under RICO. See Note, Prime-Rate Fraud Under RICO, 72 Georgetown L.J. 1885, 1890-91 (1984):

> Prime-rate discounting is widely practiced by banks that wish to reap the benefits of lending at high market rates to small business, while discounting the rates to large corporate borrowers in order to retain their valued business. But such bank practices have an inherently negative impact on a sensitive economy. As the Committee report on prime-rate lending noted,
>
> > For the public at large, the highly visible prime rate is an important economic indicator, and artificially high prime rate announcements that are not truly reflective of interest rate conditions add to inflationary expectations. While the prime rate refers to commercial loans, there is an indirect effect on other lending activity.
>
> For example, as long as the prime remains high, local mortgage lenders are unlikely to modify terms or make new commitments. Although consumer rates are less volatile than other loan rates, both the cost and the availability of consumer loans are affected by the

> "trickle-down" from the perceived prime. Thousands of loan contracts, particularly those entered into by small- and medium-sized businesses, are tied to the prime rate. Moreover, the Small Business Administration used the Wall Street Journal's daily prime-rate listing as the official base for its loan programs.
>
> It is clear, therefore, that society is best served when interest rates reflect the true opportunity cost of borrowing--and in a free market, this would occur. If a major borrower refused to pay the published prime, interest rates would decline. This natural supply-and-demand effect is vitiated, however, when banks deceive small-business borrowers. Awarding damages on fraud claims in such cases would deter the practice of making secret discounts to favored borrowers and issuing loans to smaller borrowers based on an artificial prime, and will motivate banks to reveal their lowest interest rates in order to avoid lawsuits. This flow of information, in turn, will stimulate interest-rate competition among banks, leading to the lowest rate the market will bear.
>
> The widespread use and effect of prime-rate discounting thus provide compelling reasons for seeking nontraditional methods of damage recovery which will simultaneously remedy injuries caused to a plaintiff and deter future behavior of this kind. The RICO treble-damage provision provides such a mechanism. (citations omitted)

Many of the so-called prime-rate cases under RICO, however, have not fared well. See, e.g., Walters v. First Tenn. Bank, 855 F.2d 267, 273 (6th Cir. 1988) (prime rate fraud allegation directed verdict in favor of bank on issue of intent to defraud).

36. Miller v. Moffat County State Bank, 678 F.Supp. 247 (D. Colo. 1988) (No. 21)

Coalition Comment

The Plaintiff, an individual bank customer, brought a civil RICO action against a state bank alleging fraudulent overcharges in interest on a series of prime rate-based loans.

Analysis

This case was dismissed on "pattern" grounds. The significant aspect of Miller, however, is the court's statement that the courtroom is not the proper place for attorneys to learn RICO; the court threatened to use Rule 11 sanctions in the future. See supra No. 35.

37. Montesano v. Seafirst Commercial Corp., 818 F.2d 423 (5th Cir. 1987) (No. 26)

Coalition Comment

The plaintiffs, owners of a mortgaged boat, brought a civil RICO action against the secured lender and the repossession company, alleging a RICO conspiracy in repossession of the boat.

Analysis

This sort of litigation is properly dismissed on "pattern" grounds. It should not reoccur. If it does, it should be subject to sanctions.

38. Moore v. Eli Lilly and Company, 626 F.Supp. 365 (D. Mass. 1986) (No. 25)

Coalition Comment

The plaintiffs, a husband and wife, brought a civil RICO action against a pharmaceutical company, for alleged damages suffered from ingestion of arthritis medication.

Analysis

This case may be properly dismissed on the grounds that RICO does not protect against personal injuries. The proposed legislation would not change this result, since products liability litigation would not fall within crimes of violence.

39. Morosami v. First Nat'l. Bank of Atlanta, 703 F.2d 1220 (11th Cir. 1983) (No. 47)

Coalition Comment

The plaintiff, an individual bank customer, brought a civil RICO action against the bank alleging that the prime rate used in computing the interest on the customer's loan was not the bank's true prime rate.

Analysis

The correct spelling of the case name is: Morosani v. First Nat. Bank of Atlanta, 703 F.2d 1220 (11th Cir. 1983).

The Eleventh Circuit Court of appeals properly ruled that the District Court had incorrectly held that the activities were not "traditionally criminal in nature." In fact, the Bank had systematically claimed to be charging a particular interest rate to a certain class of customers, when it was charging a higher rate to those customers. The Court of Appeals for the Eleventh Circuit reinstated the customer's claim, stating that fraud is criminal. See supra No. 35.

40. Morrison v. Syntex Laboratories, Inc., 101 F.R.D. 743 (D. D.C. 1984) (No. 50)

Coalition Comment

The plaintiff brought a civil RICO action against a manufacturer of infant milk formula alleging fraudulent advertising.

Analysis

Morrison had a products liability case pending in the federal courts for eighteen months prior to her request to amend her Complaint to include a RICO count. The District Court denied Plaintiff's request because of undue delay.

41. Park South Associates v. Fischbein, Oliveri, Rozenholc & Badillo, 626 F.Supp. 1108 (S.D.N.Y 1986) (No. 6)

Coalition Comment

A New York real estate development partnership headed by Donald Trump brought a civil RICO action against the law firm representing tenants in an apartment building that were resisting efforts of the development company to convert the apartment building into a condominium entity by initiating a number of legal proceedings aimed at delaying and preventing Trump from undertaking the conversion of the property.

Analysis

The District Court properly dismissed the RICO allegations as insufficiently plead and added:

> Since it appears that future pleading would merely waste the time and resources of the litigants as well as divert scarce judicial resources, we deny plaintiff's motion to replead and dismiss the complaint with prejudice.

626 F.Supp. at 1115.

The decision was affirmed in 800 F.2d 1128 (2d Cir. 1986), without published opinion. Here, too, the system is shown to be working well. Flagrantly ill-plead RICO suits are not being tolerated.

42. Deckarsky v. American Broadcasting Co., Inc., 603 F.Supp. 688 (D.D.C. 1984) (No. 32)

Coalition Comment

The plaintiff, a free-lance journalist and attorney, brought a civil RICO suit against ABC for use of an article without giving Plaintiff audio-visual credit during times when broadcast use was made of the article.

Analysis

The correct spelling of the case name is Peckarsky v. American Broadcasting Co., Inc., 603 F.Supp. 688 (D.D.C. 1983).

Mr. Peckarsky filed a multi-count suit against ABC alleging Copyright Act and RICO violations along with six other claims. The RICO count was dismissed for failure to allege "pattern." In addition, the Court held that the alleged predicate acts were not committed with the scienter necessary to complete the crime. Here, too, the present system is seen to be working well.

43. Pit Pros, Inc. v. Wolf, 554 F. Supp. 284 (N.D.Ill. 1983) (No. 38)

Coalition Comment

The plaintiff, a prospective commercial tenant, brought a civil RICO action against the landlord over return of $3,000 rental deposit alleging misrepresentation as to zoning and covenants running with the property.

Analysis

The District Court properly dismissed the RICO claim for relief for a failure to allege a "pattern." As such, filings of this type should not continue in the future. If they do, they should be subject to sanctions.

44. Routh v. Philatelic Leasing, Ltd., Case No. C-85-1040-AAM (E.D. Wash., March 3, 1988), reported in (CCH) RICO Business Disputes Guide Transfer Binder, Par 6914 (No. 17)

Coalition Comment

The plaintiff, the lessee of "Stamp Masters," photographic color separators and plates used for printing postage stamps, brought a civil RICO action against the lessor of "Stamp Masters," alleging fraudulent misrepresentation in connection with the lease.

Analysis

This case was properly dismissed, since the Plaintiff erroneously claimed that the lease for machines he entered into was a "security" under the securities statutes. The RICO claim was also dismissed for a failure to plead fraud with particularity. As such, filings of this type should not continue in the future. If they do, they should be subject tb sanctions.

45. Schaltz v. Botica, 3 Civ. RICO Rep. (BNA) No. 19 (N.D.Ill. June 25, 1987) (No. 27)

Coalition Comment

The plaintiff, a widow, brought a civil RICO action against the administrator of her deceased husband's pension fund, alleging that the administrator of the fund refused to award her benefits unless she agreed to have sex with him and gave him a ten percent kickback of the funds due her.

Analysis

The Defendant, Joseph Botica, is the former administrator of the pension fund of Local 1, Structural Ironworker's Union in Chicago, Illinois. He was ordered to resign in February, 1986 by U.S. District Judge Nicholas J. Bua, when he was convicted of: one count of racketeering; fourteen counts of extortion; and, one count of filing a false federal income tax return. In his indictment, one of the incidents related to his demand of a 10% kickback from the annuity fund death benefit of $1,884, owed to the four children of Robert Ray, Ms. Schalz's ex-husband.

In this case, Ms. Schalz was merely trying to collect the pitiful sum due her and her children from a convicted racketeer who, in addition to demanding a kickback, also allegedly demanded sexual favors from her before he would release the funds.

Whatever else this litigation illustrates, it is not illustrative of abusive RICO litigation. Indeed, it would still be entitled to treble damages under the proposed reform legislation. It is difficult to understand how this case was selected as an example of litigant abuse.

46. Schiller & Schmidt, Inc. v. Nordisco Corp., Case No 85C-4415 (N.D.Ill. 1986) reported in (CCH) RICO Business Disputes Guide Transfer Binder, Par. 6336 (No. 49)

Coalition Comment

The plaintiff, an office equipment supplier, brought a civil RICO action against a former employee and a printing company for fraudulently obtaining materials used in its sales catalog for use in the sales catalog of the former employee's competing business.

Analysis

The correct case name is: Schiller & Schmidt, Inc. v. Wallace Computer Services, Inc.,

One of the RICO claims was dismissed, while one was allowed to stand. The claim involved a systematic pattern of fraud. It is not an example of abuse.

47. Sendar Co., Inc. v. Megaware, Inc., Case No. 87 Civ. 8027 (PKL) (S.D.N.Y., March 11, 1988), reported in (CCH) RICO Business Disputes Guide Transfer Binder, Par. 6905 (No. 15)

Coalition Comment

The plaintiff, a distributor of housewares, brought a civil RICO action against a glassware importer alleging that the importer paid sales commissions to the distributor at lower rates than those agreed upon.

Analysis

The case, which was cited as "abusive" is a dismissal based on Rules 9(b) and 12(b)(6), with leave to amend. Sendar Co., Inc. v. Megaware, Inc., 705 F.Supp. 159 (S.D.N.Y. 1989). The result of the amended Complaint explains that the original RICO claim and the amended Complaint were dismissed because Plaintiff failed to plead fraud with particularity.

48. Shaw v. Rolex Watch, U.S.A., Inc., 673 F.Supp. 674 (S.D.N.Y. 1987) (No. 45)

Coalition Comment

The plaintiff, an importer of watches, brought a civil RICO action against the Rolex company alleging a RICO conspiracy to submit documents to the U.S. Customs Service which fraudulently stated that Rolex U.S.A. was not owned or controlled by the Swiss owner of the Rolex trademark.

Analysis

Shaw was a Rolex dealer, whose inventory was seized by Customs during shipment, after the Defendants in fact filed fraudulent forms with Customs. This litigation was in federal court based on an antitrust claim separate from the RICO claim. Denial of Defendant's motions for Rule 11 sanctions and dismissal of at least one of RICO counts show that the litigation was neither frivolous nor "abusive."

49. Sigmond v. Brown, 645 F.Supp. 243 (C.D.Cal. 1986) (No. 29)

Coalition Comment

The plaintiff, a chiropractor, brought a civil RICO action against the California Chiropractors Association and members of its peer review committee. The plaintiff claimed that the Defendants engaged in various acts of price fixing, kickback schemes, and conspired to reduce payments to chiropractors.

Analysis

Plaintiff alleged that Defendants were deriving unfair benefits from their membership in a Peer Review Committee. The District Court found that he could not establish, either factually or as a matter of law, the alleged predicate acts. Based on Plaintiff's failure to sufficiently establish the elements of the predicate acts, the District Court granted Defendant's Motion for Summary Judgment. Judgment was affirmed in 828 F.2d 8 (9th Cir. 1987).

On appeal, Plaintiff's attorney was suspended from appellate practice for six months (suspension later revoked, but censure unchanged) for making misstatements in the pleading. See In re Disciplinary Action Boucher, 837 F.2d 869, modified by, 850 F.2d 597.

While this case was pending, Plaintiff was ordered by the Los Angeles Superior Court to undergo regular psychiatric treatment for a long-term chronic mental illness described as "paranoid personality disorder." Plaintiff later shot and wounded a bailiff in court and was himself shot and killed.

Obviously, litigation undertaken by mentally ill plaintiffs and irresponsible attorneys is not RICO-specific. Nothing in the proposed reform legislation will do anything about this sort of litigation abuse.

50. Taylor v. Mondale, No. 84-3149 (D.D.C. 1985), reported in Civil RICO Rep., at 6 (BNA), June 5, 1985 (No. 2)

Coalition Comment

Suit filed against former Vice President Walter Mondale, the Democratic National Committee (DNC), and several members of the DNC, alleging they offered to channel political contributions to other Democratic candidates in exchange for promises not to oppose certain Reagan Administration policies.

Analysis

The RICO bribery charges brought against former Vice President Walter Mondale, the Democratic National Committee, and several individual members of the DNC were properly dismissed by the District Court, since RICO does not reach violations of the anti-bribery provisions of 18 U.S.C. § 203.

51. Van Schaick v. Church of Scientology, 535 F.Supp. 1125 (D.Mass. 1982) (No. 40)

Coalition Comment

The plaintiff, a former member of the Church of Scientology, brought a civil RICO action claiming she had been defrauded into joining the church and defrauded into purchasing church educational materials.

Analysis

The RICO claim was properly dismissed for failure to plead fraud with particularity and because RICO does not cover personal injury.

52. White v. Fosco, 599 F.Supp. 710 (D.D.C. 1984) (No. 46)

Coalition Comment

A civil RICO action was brought against the two attorneys who had represented members of the Mail Handlers Union in a successful class action against the U.S. Postal Service over the right of the attorneys' to personally retain the award of attorneys' fees.

Analysis

In fact, this litigation was brought by union members against figures in a mob controlled union. It is hardly abusive. The Laborer's Union is thought to be a tool of the crime syndicate by the Department of Justice. The President's Commission on Organized Crime in 1986 reached a similar conclusion. Report to the President and the Attorney General, The Edge: Organized Crime, Business, and Labor Union 145-66 (1986).

Angelo Fosco, who took over the Union when his father, Peter, died in 1975, is thought to take orders from Joseph Aiuppa, the current head of the organized crime family in Chicago. Peter, in turn, had been an associate of Paul Ricca, the former head of the Chicago family. Fosco and Anthony Accardo, another leader from Chicago, were tried in Florida for skimming an alleged two million dollars from the Union's health and welfare funds. An associate was convicted; they were acquitted. A grand jury is now investigating allegations that the jury was fixed.

The District Court improperly dismissed the RICO claim for relief on the grounds that no "racketeering injury" occurred. This position was rejected in Sedima. The District Court, however, properly refused to dismiss the claims alleging that breaches of fiduciary responsibility were engaged in by the lawyers against whom the suit was brought.

Whatever else this litigation illustrates, it hardly illustrates litigation abuse under RICO.

53. Zimmerman v. HBO Affiliates Group, 834 F.2d 1163 (3d Cir. 1987) (No. 5)

Coalition Comment

HBO was sued by a group of homeowners, each of whom HBO had sent a letter accusing them of illegal reception of HBO programming; HBO's letter advised the homeowners that they would be included as defendants in a civil suit unless they stopped illegally receiving HBO's signal. The plaintiff homeowners alleged that HBO's action in mailing the letters constituted a pattern of racketeering activity based on extortion.

Analysis

> A plaintiff seeking recovery under RICO must allege injury "in his business or property" caused by violation of the act. 18 U.S.C. § 1964.

The case was properly dismissed as to the lead plaintiff, since he could not allege more than mental distress. In addition, the Court of Appeals for the Third Circuit properly held that the conduct did not constitute extortion.

[June 7, 1989]

Testimony
of
Prof. G. Robert Blakey
on

S. 438
The RICO Reform Act of 1989

United States Senate
Committee on the Judiciary

(Oral Presentation)

Identification

My name is G. Robert Blakey. I am the William J. and Dorothy O'Neill Professor of Law at the Notre Dame Law School. My appearance here today, however, is personal. Nothing that I say should be attributed to Notre Dame or to anyone else with whom I am associated.

Introduction

The drive to amend RICO is fueled by unjustifiable myths, half-truths, and stale data. The real facts are presented in a paper, which is appended to my testimony. The focus of my oral testimony, therefore, will be on the key provisions of S.438, the RICO Reform Act of 1989.

Additional Predicate Offense

I applaud the addition to RICO of new crimes of violence. I applaud, too, the new fraud predicates. But the bill omits the single most important new fraud predicate: 18 U.S.C. § 1344, bank fraud.

In light of the saving and loan scandals on every Main Street in the nation, no valid reason can be offered for its exclusion.

I would also recommend the inclusion of the relevant hazardous waste offenses and the clarification that "fraud in the sale of securities" in the present statute refers to the criminal offenses, i.e., 15 U.S.C. §§ 77s; 77ff; etc.

Finally, in light of the commodity fraud scandals in New York and Chicago, I recommend the express inclusion of violations of the Commodity Exchange Act, § 7 U.S.C. § 13.

I add only one other point here. If RICO is to be made applicable civilly to violent crime groups as well as organizations that engage in patterns of criminal fraud, two additional changes are necessary--

1. the right to obtain equity-type relief, particularly pre-trial orders that prevent the dissipation of assets, must be clarified, and
2. decisional law that holds that RICO is inapplicable to crimes that are not economically motivated must be set aside.

See Republic of Philippines v. Marcos, 863 F.2d 1355, 1359, 1361 (9th Cir. 1988) (injunction to prevent dissipation of assets not available under RICO, but granted under California law); United States v. Ivic, 700 F.2d 51, 59 (2d Cir. 1983) (Croatian nationalist terrorist conviction under RICO reversed since no financial motive).

Civil Recovery: Financial Fraud

Today, this nation is plagued by fraud in financial institutions--banks, thrifts, insurance companies, welfare and pension funds, securities dealers, and other similar institutions. They are, moreover, failing at unprecedented rates. All of the governmental and journalistic studies of these failures agree that a substantial portion of these failures is attributable, not to bad management or poor economic conditions, but to out-and-out fraud. Swindlers have, in short, inflicted untold harm on these financial institutions.

Various governmental insurance programs back up these institutions, including, for example, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, the National Credit Union Administration, the Pension Benefit Guaranty Corporation, and the Securities Investor Protection Corporation. State insurance commissioners play a similar role at the state level for insurance companies. Ultimately, therefore, taxpayers will have to pick up the tab for most financial institution fraud.

History will not be kind to the authors of S.438 and its supporters to the degree that the government entity provisions of the bill do not permit these guarantee corporations to sue for treble damages, not only for injury to the government itself, but also the insured entity. The present wording of the bill leaves the scope of these suits in substantial doubt.

Unjustifiably, too, the state insurance commissioners are completely excluded.

I also find paradoxical the exclusion of Indian tribes and tribal organizations from government related suits, particularly so in light of the Indian fraud scandals now being uncovered by the principal author of S.438.

These provisions have the effect of taking new money out of taxpayer's pockets and leaving stolen money in the pockets of swindlers and those lawyers, accountants, and others, who are in league with them.

No showing has been made that these government related suits are abusive.

When the taxpayers of this nation find out what this bill did to them, the retribution will be swift; it will also be fully deserved.

Treble vs. Actual Damages

The lowering of the measure of damages from treble to actual for most RICO suits will lessen the deterrent impact of the statute. Treble damages are swift, certain and severe. Actual damages are not.

Since actual damages do not include opportunity and transaction costs, it will also leave victims of patterns of criminal behavior less than whole.

That, too, is unjust and indefensible.

More than 119 federal statutes, moreover, authorize granting counsel fees to a prevailing party. See Mark v. Chesny, 473 U.S. 45, 45-52 (1985).

Why exclude the victims of patterns of criminal behavior from that list?

Special Treatment for Securities and Commodities Swindlers

Little or no justification exists for the general exclusion of securities or commodities fraud from the multiple damages provisions of the revised statute.

Nothing that is now going on in New York or Chicago warrants special treatment for these industries.

An appropriate definition of "pattern" will keep routine cases confined to the securities or commodities acts. The Supreme Court will shortly provide it in the H.J., Inc. appeal (cert. granted, 56 U.S.L.W. 3632, 3647 (U.S. March 22, 1988)) . If not, this Committee should.

Aggravated fraud belongs in RICO.

This is special interest legislation that reflects lobbying, not the public interest, or an even-handed perspective.

Personal Injury for Crimes of Violence

I applaud the inclusion of personal injury for crimes of violence. But little or no warrant is present for shifting from treble damages to actual damages plus punitive damages on clear and convincing evidence when such injuries occur.

Allegations of abuse focus on commercial litigation, not crimes of violence.

Here, too, treble damages would be swift, sure and severe. Punitive damages, so circumscribed, would not be.

Why lessen protection for victims of violence?

Criminal Conviction

The treble damage provisions for those convicted of a crime is ill-drafted, ill-designed, and unfair.

If what is intended is the exclusion of strict liability offenses, the present language does not accomplish that objective. Paragraph (B)(ii) should read "include a showing of a state of mind for each material elements of the offense" (emphasis added).

It is ill-designed because it would adversely affect plea bargaining in criminal prosecutions and cross examination in criminal trials.

No prosecutor ought to be able to affect the measure of civil damages, as he selects charges. His stick is big enough now.

The creditability of witnesses, too, ought not be judged on the basis of what they might receive if the defendant is convicted.

It is unfair since it does not extend the treble damage liability to those equally culpable--to aiders and abettors, conspirators, and others responsible for the defendant's conduct.

Similarly situated perpetrators ought to be treated similarly.

Statute of Limitation

At four years, the statute of limitations in the new statute will cause "forum shopping" to occur between federal RICO and state RICO. State RICO statutes are usually five years. This ought to be avoided.

Note, too, that since the general federal criminal statute is five years, a one year break will exist between the civil and the criminal statute. This will needlessly force plaintiffs to sue before a prospective criminal prosecution is instituted. Plaintiffs should not be put in this vice.

Particularity Pleading

Particularity pleading inherently favors defendants. Generalizing this requirement to all RICO elements rather than focusing the requirement on the need to limit the bringing-in-of secondary parties without adequate justification is a throw-back to common law pleading. It reflects a mindless hostility to RICO plaintiffs.

Retroactivity

Making these changes retroactive is unseemingly and unAmerican.

Congress sits to legislate, not adjudicate.

Cynics will believe that defendants bought this legislation with political contributions.

Americans do not play cards this way.

They ought not legislate this way.

[June 7, 1989]

Testimony
of
Prof. G. Robert Blakey
on

S. 438
The RICO Reform Act of 1989

United States Senate
Committee on the Judiciary

White-collar crime is 'the most serious and all-pervasive crime problem in America today . . . . ' Although this statement was made in 1980, there is no reason to think that the problem has diminished in the meantime.

Braswell v. United States, 108 S.Ct. 2284, 2294 n.9 (1988) (Rehnquist, C.J.)

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Appendix A: Chart Comparing RICO Reform Act of 1989 and Present Law

Appendix B: Chart of RICO Civil Filings, November, 1985 - December, 1988

I. Introduction.

On February 23, 1989, Senator Dennis DeConcini and Congressman Rick Boucher introduced S. 438/H.R. 1046, "The RICO Reform Act of 1989."[1] In large measure, the proposed legislation would set aside the right of victims of patterns of criminal conduct under RICO, Title IX of the Organized Crime Control Act of 1970, to obtain adequate civil redress. Drafted at the request of representatives of the securities and commodities industries and the accounting profession, the proposed legislation, in most litigation under the 1970 Act, would:

(1) reduce the measure of damages from treble to actual damages,

(2) eliminate the provision for counsel fees for a prevailing party,

(3) exclude the securities and commodities industries from the scope of the 1970 Act, and

(4) apply its provisions retroactively to pending litigation.[2]

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[1] See, e.g., 135 Cong. Rec. S 1652-57 (daily ed. Feb. 23, 1989) (introduction of S. 438). Paradoxically, Senator DeConcini is chairman of the Special Committee on Investigations of the Select Committee on Indian Affairs, which is looking into allegations of wide-spread fraud against American Indians. See S. Rep. No. 100-510, 100th Cong., 2d Sess (1988). The investigation grew out of a series of stories that appeared in the Arizona Republic. See editions of Oct. 4-11, 1987. The paper outlines, among other things, that "oil companies have looted billions of dollars worth of oil and gas from Indian and federal lands, sometimes aided by negligent or corrupt government officials." Id., Oct. 4, 1987, p. 3, col. 1. The oil companies will be one of the chief beneficiaries of the DeConcini legislation; the Indians will be one of the chief losers. See also N.Y. Times, May 10, 1989, p. 7, col. 3 (Chris Tucker, expert testifying before DeConcini Committee, on oil theft by oil companies: "Its very easy to steal from Indians. There are no checks and balances."); id. May 5, 1989, p. 16, col. 6 (Indians cheated out of millions of dollars of oil and oil royalties).

[2] Appendix A includes a chart that compares the "RICO Reform Act of 1989" to present law.

Until the recent investigation and indictment of Michael R. Milken, former head of Drexel Burnham Lambert Inc.'s junk bond operations, on 98 counts of RICO and criminal securities fraud for cheating his clients, the public controversy over RICO

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largely focused on its private civil enforcement mechanism; it now includes its criminal sanctions.

RICO authorizes the criminal forfeiture of ill-gotten gains and the interest of an offender in an enterprise run corruptly. United States v. Porcelli, 865 F.2d 1352, 1354-66 (2d Cir. 1989) (forfeitures upheld, but subject to 8th Amendment proportionality). It also authorizes the issuance, on a proper showing, of pretrial restraints or the posting of a bond to prevent the dissipation before verdict of assets subject to forfeiture. United States v. Regan, 858 F.2d 115, 120-22 (2d Cir. 1988) (restraint or bond upheld). Such pretrial remedies are a common feature of litigation. See, e.g., Republic of Philippines v. Marcos, 863 F.2d 1355, 1359, 1361 (9th Cir. 1988) (injunction upheld to prevent dissipation of assets); Int'l Control Corp. v. Vesco, 490 F.2d 1334, 1347 (2d Cir.) (injunction upheld to prevent impairment of assets), cert. denied, 417 U.S. 932 (1974).

The Milken indictment seeks a $1.85 billion in forfeitures from Milken and his co-defendants. N.Y. Times, March 30, 1989, p. 1, col. 1. If found guilty, Milken's illegal earnings will have been exceeded only by those of Al Capone. Wall Street Journal, March 31, 1989, p. 1, col. 4. Milken has agreed to post a bond to secure his portion of the forfeiture of $700 million in cash and other assets and to post bail in the amount of $1 million. N.Y. Times, April 15, 1989, p. 1, col. 1. Drexel itself has agreed to plead guilty to securities fraud and pay $650 million in fines and sanctions. Id. While Drexel publicly protests it was unfairly forced to plead guilty, since it feared that pretrial restrains would put it out of business, it privately told its employees that, if indicted under RICO, it would "have the opportunity to post a bond to forestall any pretrial restraint, [which] will permit us to continue operations." Wall Street Journal, Feb. 15, 1989, p. 1, col. 1. It also informed the United States District Court that its plea will be "voluntary." Wall Street Journal, March 31, 1989, p. A4, col. 6 ("voluntarily and without coercion").

Newspaper columnists decry RICO's pretrial restraints as an unconstitutional interference with the presumption of innocence. See Wall Street Journal, Feb. 15, 1989, p. 1, col. 1 (commentary of William Safire and other criticized). In fact, defendants, on a proper showing, may be detained in jail pretrial consistent with the constitution. See, e.g., United States v. Salerno, 107 S. Ct. 2095 (1987). It is doubtful that greater pretrial rights ought to be afforded to property than liberty. Nevertheless, those who seek to reform RICO are not moving to alter its criminal provisions. N.Y. Times, March 12, 1989, p. 2C, col. 1 (Cong. Boucher: "[T]here is no sentiment to limit RICO on the

Similar, but less restrictive, legislation failed to pass in the 100th Congress because it was widely perceived to be special interest legislation. Congressman John Conyers, a principal spokesman for those who opposed the legislation, aptly observed:

> [I]n light of the current scandals on Wall Street, I believe that it is wholly unjustifiable to treat securities or commodities fraud in any fashion different from, say, insurance or bank fraud. I see no valid reason why aggravated patterns of criminal behavior in the securities or commodities industries do not merit RICO's enhanced sanctions. I see no ground, in short, for a double standard.
>
> Similarly, I believe that it would be profoundly unwise, wholly inappropriate, and constitute both a troubling and unseemly precedent to make RICO reform retroactive so as to restrict the measure of recovery in pending cases.
>
> I see no reason to give the likes of Boesky or Butcher in their stock fraud or bank fraud activities a special bill of relief. Congress sits to legislate, not settle pending litigation.

134 Cong. Rec. E3720 (daily ed. Oct. 21, 1988) (remarks of Rep. John Conyers).

A need exists both to fine-tune and strengthen RICO, but as the New York Times of October 6, 1988, p. 19, col. 1, editorially observed:

> Reducing damages would reduce deterrence. It makes no sense to exempt commodities and securities frauds when these seem rampant. Above all, retroactive relief is unfair. By going along with it, Congress would turn itself into a partial substitute for impartial courts.

Unless it is substantially amended, the "RICO Reform Act of 1989" ought not pass the 101st Congress.

This memorandum reviews the background of the 1970 Act, the myths that are used to promote its "reform," and the facts that ought to be considered in any effort to amend it.

II. Background of 1970 Act.

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criminal side.").

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as the "Racketeer Influenced and Corrupt Organizations Act" (RICO), 18 U.S.C. § 1961 et seq. Congress enacted the 1970 Act "to strengthen[] the legal tools in the evidence gathering process, . . . [to] establish[] new penal prohibitions, and [to] provide[] enhanced sanctions and new remedies . . . ." 84 Stat. 923. Among other things, Congress was concerned about "fraud." Id. at 922. In addition to fraud, RICO covers violence, the provision of illegal goods and services, corruption in labor or management relations, and corruption in government. Congress found that "the sanctions and remedies available" under the law then current were "unnecessarily limited in scope and impact." 84 Stat. 923. It then provided treble damage relief for "person[s] injured" in their "business or property" by violations of the statute. 18 U.S.C. § 1964(c). At the time, the private civil remedies had been called for by no less than the President, ("Message on Organized Crime," reprinted in, Hearings before the Subcommittee on Criminal Laws and Procedures, U.S. Senate Committee on the Judiciary, 91st Cong. 1st Sess. 449 (1969) (Senate Hearings)), the President's Commission on Crime and the Administration of Justice, (The Challenge of Crime in a Free Society 208 (1967)) and the American Bar Association. (Senate Hearings at 259; Hearings before Subcommittee No. 5, House Committee on the Judiciary, 91st Cong, 2nd Sess. 537 (1970) (House Hearings)). In response, the Senate passed the bill 73 to 1. 116 Cong. Rec. 972 (1970). The House passed an amended bill 431 to 26. Id. at 35,363. The Senate then passed the House bill without objection, and the President signed the legislation on Oct. 15, 1970. Id. at 36,296; 37,264.

Today, however, RICO is under sharp attack from a variety of quarters. See generally Goldsmith & Keith, Civil RICO Abuse: The Allegations in Context, 1986 Brigham Young U. L. Rev. 55; Note, Congress Responds to Sedima: Is There a Contract Out on Civil RICO?, 19 Loy. L. A. L. Rev 851 (1986). In fact, RICO now stands largely without friends or supporters.

III. Myths and Facts.

> "Myth"--"a belief . . . whose truth is accepted uncritically." The Random House Dictionary 581 (1980).

1.1 Myth: The Courts Are Being Inundated With New Litigation Under Civil RICO.

See 132 Cong. Rec. H. 9371 (Oct. 7, 1986, daily ed.) (remarks of Rep. Frederick C. Boucher):

> [T]he federalization of thousands of mere commercial disputes, irrespective of the amount in controversy or the diversity of citizenship of the parties threatens to swamp a Federal judiciary that was never designed to handle these kinds of case.

1.2 Fact: Civil RICO Litigation Is Neither Wholly New Nor of Floodgate Proportions.

Previously, separate data on Civil RICO litigation were not kept by the Administrative Office of the United States Courts. 1985 is a typical year. See Annual Report of the Director of the Administrative Office of the United States Courts (1985). Approximately 275,000 civil cases were filed that year. Id. at 11. Approximately 39,000 criminal prosecutions were brought. Id. at 16. Slightly more than 118,000 of the civil cases involved the United States as a plaintiff or defendant; private litigation embraced approximately 160,000 filings, of which 60% is federal question and 40% were diversity litigation. Id. at 11. The principal areas of litigation were recovery and overpayments and enforcement of judgments (47,000), prisoner petitions (30,000), social security (25,000), civil rights (20,000), and labor (11,000). Id. at A-12-13. Antitrust included 959 civil filings, id. A-12, and 47 criminal cases. Id. at A-47. Securities, commodities, and exchange-related civil cases made up 3,200 filings, id. at A-13, and 13 criminal prosecutions. Id. at A-46. Fraud-related civil filings made up 1,700. Id. at A-12. In fact, securities and fraud-based RICO litigation, which was initiated pre-*Sedima*, comprised 77% of the ABA study on Civil RICO. Ad Hoc Civil RICO Task Force: ABA, Corporations, etc. 55-56 (1985). Accordingly, if most securities and fraud-related cases were also RICO cases, RICO filings would not exceed 5,000, not more than 2% of all federal filings. How many wholly new pieces of litigation, particularly in the fraud area, RICO will draw into the federal courts cannot be reliably determined. It is doubtful, however, that the number will be relatively high, as most significant commercial litigation is now in the federal courts under other federal statutes or diversity jurisdiction. In fact, the Department of Justice indicated that of the approximately 500 civil RICO cases brought pre-*Sedima*, 61% of them had an independent basis for federal jurisdiction. Oversight on Civil RICO Suits, Hearings before the Senate Judiciary Committee, 99th Cong., 1st Sess. at 127 (1985) (Oversight) More recently, Administrative Office data indicate that in 1988, the latest year for which complete information is available, only 950 civil RICO cases were filed--not thousands.[3] As such, "the perceived problem of civil RICO case load is exaggerated. . ." 2 Civil RICO Report No. 34 at 3 Feb. 4, 1987). (remarks of Judge Pamela A. Rymer). In fact, the decisions have now "calmed down" and "actually present no greater problem than antitrust or complicated securities cases." *Id.* In fact, too, docket congestion is not everywhere a problem. *See*, *e.g.*, *Penvert Development Corp. Ltd. v. Dow Chemical Co.*, 667 F.Supp. 436, 441 (E.D. Mich. 1987)("not tremendously overburdened"). *See also*, Bok, *A Flawed System of Law Practice and Training*, 33 J. Leg. Educ. 570, 571 (1983) ("The number of disputes actually litigated . . . does not appear to be rising much faster than the population"). While the absolute number of general filings has increased by roughly one half, the average number of cases per federal judge from 1960 to 1980 has stayed about the same. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 So. Calif. L. Rev. 65, 81-85 (1981). Indeed, from 1900 to 1980, the length of civil cases fell by over one half. *Id.* The literature complaining about the litigation explosion, in short, shows "a strong admixture of naive speculation and undocumented assertion." Glanter, *Reading the Legal Landscape of Disputes*, 31 UCLA L. Rev. 4, 62 (1983).

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[3] Appendix B includes a chart on RICO filings from November, 1985 to December, 1988.

Dire predictions of an explosion of new federal litigation, moveover, need to be put into perspective. Litigation itself, as the Supreme Court recognized in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 105 S.Ct. 2265, 2278 (1985), is not "an evil." "Over the course of centuries," the Court noted, "our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail." *Id.* "That our citizens have access to their civil court," the Court concluded, "is not an evil to be regretted; rather, it is an attribute of a system of justice in which we ought to take pride." Accordingly, it ought to be recognized that the mere *fact* of RICO suits is *not* a matter to be decried or deplored.

2.1 *Myth: RICO was Designed to Deal Only With Organized Crime*.

See *Oversight* at 241 (remarks of Ray J. Grover, American Institute of Certified Public Accountants):

> [T]he legislative history of the civil RICO confirms that Congress intended to create a weapon in the war against organized crime, but at no time did Congress envision that it was creating a powerful new weapon to be used against legitimate business people in ordinary commercial disputes having nothing whatsoever to do with organized crime.

2.2 Fact: RICO was Designed, Not Only To Deal With Organized Crime, But Also Other Forms of Enterprise Criminality.

116 Cong. Rec. 35, 204 (1970) (remarks of Rep. Robert McCory, a House floor manager of RICO):

> [E]very effort . . . [was] made [in drafting RICO] to produce a strong and effective tool with which to combat organized crime--and at the same time deal fairly with all who might be affected by . . . [the] legislation--whether part of the crime syndicate or not.

See Sedima S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 495 (1985) ("not just mobsters"); State v. Thompson, 751 P.2d 805, 815 (Utah App. 1988) ("nexus to organized crime" for Utah RICO not required); Banderas v. Banco Central del Ecuador, 461 So.2d 265, 269 (Fla. 3rd DCA 1985) (Fla. RICO not limited to organized crime; no "garden variety" fraud exclusion); Com'n v. Yacoubian, 489 A.2d 228 (Pa. Super 1985) (Pa. RICO not limited by preamble to infiltration of legitimate business).

Legitimate businesses "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences." Sedima, 473 U.S. at 499.

While RICO was aimed at organized crime, its use "as a weapon against 'white collar crime' is not contrary to the intent of Congress but is in fact one of the 'benefits' Congress saw the Act as providing." Papai v. Cremosnik, 635 F.Supp. 1402, 1411 (N.D. Ill. 1986).

Writing in 1967, the President's Crime Commission, whose studies led to RICO, noted on the question of white-collar crime:

> During the last few centuries economic life has become vastly more complex. Individual families or groups of families are not self-sufficient; they rely for the basic necessities of life on thousands or even millions of different people, each with a specialized functions, many of whom live hundreds or thousands of miles away.
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> x x x
>
> [W]hite-collar crime [is]--[a term] now commonly used to designate those occupational crimes committed in the course of their work by persons of high status and social repute [that] . . . are only rarely dealt with through the full force of criminal sanctions.

x x x

> Serious erosion of morals accompanies [the white collar offender's violation]. [Those who so] flout the law set an example for other businesses and influence individuals, particularly young people, to commit other kinds of crime on the ground that everybody is taking what he can get.

The Challenge of Crime in a Free Society 47-48 (1967).

See Blakey, The RICO Civil Fraud Action, 58 Notre Dame L. Rev. 237, 280 (1983) (Civil Action):

> [A] review of the legislative history of S. 30 [the Organized Crime Control Act] in general, and Title IX in particular, establishes the following points beyond serious question:
>
> (1) Congress fully intended, after specific debate, to have RICO applied beyond any limiting concept like "organized crime" or "racketeering;"
> (2) Congress deliberately redrafted RICO outside of the antitrust statutes, so that it would not be limited by antitrust concepts like "competitive," "commercial," or "direct or indirect" injury;
> (3) Both immediate victims of racketeering activity and competing organizations were contemplated as civil plaintiffs for injunction, damage, and other relief;
> (4) Over specific objections raising issues of federal-state relations and crowded court dockets, Congress deliberately extended RICO to the general field of commercial and other fraud; and
> (5) Congress was well aware that it was creating important new federal criminal and civil remedies in a field traditionally occupied by common law fraud. (emphasis in original).

Civil Action's review of the legislative history of RICO was cited with approval in Russello v. United States, 464 U.S. 16, 28 (1983).

3.1 Myth: RICO Was Designed To Deal Only With The Infiltration Of Legitimate Business.

See Oversight at 719 (remarks of David Albenda, New York Life Insurance Co):

> The civil liability provisions of RICO were intended by Congress to protect legitimate businesses from infiltration by organized crime.

3.2 Fact: RICO Was Designed, Not Only To Deal With The Infiltration of Legitimate Business, But Also Other Forms of Enterprise Criminality.

"[T]he major purpose of Title IX [was] to address the infiltration of legitimate business by organized crime." United States v. Turkette, 452 U.S. 576, 591 (1982).

"[W]e are unpersuaded [,however,] that Congress . . . confined RICO [to] only the infiltration of legitimate business." 452 U.S. at 590 (emphasis in original).

See generally Goldsmith, RICO and Enterprise Criminality: A Response to Gerald E. Lynch, 88 Col. L. Rev. 774 (1988).

4.1 Myth: RICO Applies To Every Business Transaction That Uses the Mails or Phones.

See 132 Cong. Rec. H. 9371 (Oct. 7, 1986, daily ed.) (remarks of Rep. Frederick C. Boucher):

> [F]raud allegations are commonly made in contract situations, and all that is needed to convert a simple contract dispute into a civil RICO case is the allegation that there was a contract and the additional allegation that either the mails or the telephones were used more than once in either forming or breaching the contract.

4.2 Fact: RICO Applies Only to Pattern of Unlawful Behavior, Not Single Transactions.

The circuit courts of appeal are making it abundantly clear that RICO does not apply to isolated acts. See, e.g., Roeder v. Alpha Industries, Inc., 814 F.2d 22 (1st Cir. 1987) (single bribe in three installments not "pattern" despite several communications). The Supreme Court is expected shortly to confirm these decisions. H.J., Inc. v. Northwestern Bell Telephone Co., 829 F.2d 648 (8th Cir. 1987), cert. granted, 108 S.Ct. 1219 (1988).

See generally, Note, Reconsideration of Pattern in Civil RICO Offenses, 62 Notre Dame L. Rev. 83 (1986).

5.1 Myth: RICO Applies to Mere Contract Disputes.

See 132 Cong. Rec. H. 9371 (Oct. 7, 1986, daily ed.) (remarks of Rep. Frederick C. Boucher):

> RICO is so broad-based that virtually any party that has become embroiled in a commercial dispute becomes a candidate for a civil RICO case.
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> [V]irtually every type of contract dispute has been turned into a RICO case.

5.2 Fact: RICO Requires a Showing of Bad Faith, That is, A Good Faith Dispute Is Not Within RICO.

None of RICO's predicate offenses is applicable on a showing of strict liability. Each requires a showing of mens rea or "criminal intent."

See, e.g., Durland v. United States 161 U.S. 306, 314 (1896) (mail fraud) (if evidence had shown that defendant acted in good faith, "no conviction could be sustained"); Bender v. Southland Corp., 749 F.2d 1205, 1216 (6th Cir. 1984) (RICO mail fraud requires intent to defraud); Dan River, Inc. v. Icahn, 701 F.2d 278, 291 (4th Cir. 1983) ("Criminal intent is . . . necessary in either mail fraud or securities fraud [under RICO].")

6.1 Myth: The General Remedies Against Litigation Abuse Are Inadequate.

See RICO Reform, Hearings before the House Subcommittee on Criminal Justice, 99th Cong., 1st and 2nd Sess. 177 (1985) (no effective means exist for controlling frivolous litigation under RICO) (statement of N. Minow reflecting views of Arthur Anderson & Co.).

6.2 Fact: The General Remedies Against Litigation Abuse Are Adequate.

See Report of the Proceedings of the Judicial Conference of the United States, Sept. 21-22, 1983, at 56:

> Judge Hunter stated that the Subcommittee on Judicial Improvements, at the request of Judge Alfred T. Goodwin, had explored ways and means to reduce frivolous or meritless litigation in the courts and had canvassed the various courts for ideas and suggestions. After consideration of the suggestions received, the Subcommittee concluded, as did many judges, that the existing tools are sufficient, but perhaps not fully understood or utilized.

See, e.g., Ferguson v. M. Bank Huston, N.A., 808 F.2d 358, 360 (5th Cir. 1986) (Rule 11: monetary sanctions and injunction against further litigation under RICO); Spiegel v. Continental Illinois National Bank, 790 F.2d 638, 650-51 (7th Cir. 1986) (Rule 38 sanctions applied to RICO); Gordon v. Heimann, 715 F.2d 531 (11th Cir. 1983) (bad faith counsel fees in RICO: inherent power, Rule 11, and 28 U.S.C. § 1927); Bush v. Rewald, 619 F. Supp. 585, 604-06 (D.C. Hawaii 1985) (Rule 11 supports counsel fees for failure to investigate RICO facts); WSB Electric Co. v. Rank & File Committee to Stop the 2-Gate System, 103 F.R.D. 417 (N.D. Cal 1984) (RICO not applicable to labor dispute: Rule 11 sanctions applied); Financial Federation, Inc. v. Ashkanazzy (1984) Fed. Sec. L. Rep. (CCH) para. 91,489 (D.C. Cal. 1983) (Rule 11 award of $150,000 in legal fees in frivolous RICO claim), vacated and remanded, 742 F.2d 1461 (9th Cir. 1984), reinstated in unpublished opinion; King v. Lasher, 572 F. Supp. 1377, 1385 (S.D.N.Y. 1983) (dispute over will frivolous RICO claim; counsel fee awarded under Rule 11).

See N.Y. Times, March 17, 1989, p.10B, col. 3 (Christic Institute assessed $1 million for bringing frivolous RICO lawsuit).

See also Steven, J. in dissent in Hoover v. Ronwin, 466 U.S. 558, 601 (1984):

> Frivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine. Our legal system has developed procedures for speedily disposing of unfound claims; if they are inadequate to protect [individuals] from vexatious litigation, then there is something wrong with those procedures, not with the law.

See also Meyers v. Bethlehem Ship Building Corp., 303 U.S. 41, 51-52 (1938) (Brandeis, J.) ("Lawsuits . . . often prove to . . .[be] groundless; but no way has been discovered for relieving a defendant from the necessity of a trial to establish the fact.")

7.1 Myth: State Common Law Jurisprudence Alone Is Adequate to Deal With Fraud.

See Oversight at 634-35 (remarks of Edward I. O'Brien, Securities Industry Association):

> [H]undreds of years of common law interpretation of state law fraud is completely subverted to RICO.

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> [The] nation [ought not] . . . abandon well over 200 years of common law development by the states of what fraudulent practices are . . . .

Id. at 590-91 (remarks of Richard P. Swanson, New York State Bar Association):

> There are, and there have always been, remedies for common law fraud and securities fraud. There is no evidence whatsoever that those remedies are inadequate. There is no evidence of an epidemic of fraud in the last 20 years that would necessitate the broad, new remedies which RICO provides.

7.2 Fact: State Common Law Jurisprudence Alone Is Not Adequate to Deal with Sophisticated Forms of Fraud.

In the 18th and 19th century, state common law fraud jurisprudence was developed in the context of the then prevailing philosophies of laissez faire and caveat emptor, which were aptly summed up by Mr. Justice Dennison in Queen v. Jones [1794] Salk 397, 91 Eng. Rep. 330: "[W]e are not to indict one man for making a fool of another."

Congress found that sort of jurisprudence inadequate in 1970, when it enacted RICO. 84 Stat. 923. Writing in 1967, the President's Crime Commission, whose studies led to RICO, noted in its The Challenge of Crime in a Free Society 47-48 (1967):

> Fraud is especially vicious when it attacks, as it so often does, the poor or those who live on the margin of poverty. Expensive nostrums for incurable diseases, home improvement frauds, frauds involving the sale or repair of cars and other criminal schemes create losses which are not only sizable in gross but are also significant and possibly devastating for individual victims." Id. at 33-34.

Since 1970, 28 states have enacted RICO-type legislation, 22 of which include the private multiple damage suit. Blakey, Equitable Relief under RICO, 62 Notre Dame L. Rev. 526, 596 (1987) (chart comparing federal and state RICO statutes). As such, the law of the 18th or 19th century can hardly be characterized--simply-- as not "inadequate."

Congress, too, enacted legislation in the 1930's to deal with securities fraud, precisely because state fraud law in that area was inadequate to deal with "racketeering" on Wall Street.

See, e.g., 77 Cong. Rec. 3801 (1933) (remarks of Senator Duncan Fletcher, leading sponsor of Securities Act of 1933) (["Securities Act" is] designed to protect the public from financial racketeering of . . . investment bankers . . . .").

Voices were also heard in the 1930's, which sought to repeal or modify the Securities Act of 1933. It was suggested that the legislation was so "draconian" that it would "dry up the nation's underwriting business and that 'grass' would grow on Wall Street." D. Ratner Securities Regulation 80 (1982). Justice Frankfurter--then a professor and one of the leading spokesmen for the securities acts--put it well:

> The leading financial law firms who have been systematically carrying on a campaign against [the Securities Act of 1933] have been seeking--now that they and their financial clients have come out of their storm cellar of fear--not to improve but to chloroform the Act. They evidently assume that the public is unaware of the sources of the issues that represent the boldest abuses of fiduciary responsibility. J. Seligman, The Transformation of Wall Street 79 (1983).

History repeats itself. If anything, the federal law that protects against securities and commodities fraud needs to be strengthened, not weakened.

8.1 Myth: Since Law Enforcement Agencies Can be Depended Upon to Prosecute the Real Malefactors, Private Enforcement Mechanisms Are Not Needed.

See Oversight at 310 (remarks of Ray J. Grover, American Institute of Certified Public Accountants) (appendix):

> It is baseless to assert that the targets of the private Civil RICO cases that private lawyers have brought in the absence of prior convictions would have been prosecuted if only federal and state prosecutors had more resources.

8.2 Fact: Law Enforcement Can Not Do the Whole Job.

If this myth were true, it would justify the repeal of the antitrust statutes, which also contain a private multiple damage claim for relief. Yet the antitrust acts have been termed "the Magna Charta of free enterprise." United States v. Topco Associations, Inc., 405 U.S. 596, 610 (1972). Like the antitrust laws, RICO creates "a private enforcement mechanism that . . . deter[s] violators and . . . provide[s] ample compensation to the victims . . . ." Blue Shield of Virginia et al v. McCready, 457 U.S. 465, 472 (1982). See Sedima, 473 U.S. at 493; Alcorn County, Miss. v. U.S. Interstate Supplies, 731 F.2d 1160, 1165 (5th Cir. 1984) (Congress intended RICO's treble damage action to "provide strong incentives to civil litigants . . . in deterring racketeering . . ."). RICO's treble damage provisions were "intended by Congress . . . to encourage private enforcement of the laws on which RICO is predicated." Id. Accordingly, RICO and the antitrust statutes are well integrated. "There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power." C. Kaysen & D. Turner, Antitrust Policy 17 (1959). RICO focuses on the first two; antitrust focuses on the third. As the antitrust laws seek to maintain economic freedom in the market place, so RICO seeks to promote integrity in the market place.

Then Assistant Attorney General Steven S. Trott, now Judge, had this to say before the Senate Judiciary Committee about RICO's private enforcement mechanism:

> [I]n gauging the overall deterrent value of auxiliary enforcement by private plaintiffs, the deterrence provided by the mere threat of private suits must be added to the deterrence supplied by the suits that are actually filed. Furthermore, as the federal government's enforcement efforts continue to weaken organized crime and dispel the myth of invulnerability that has long surrounded and protected its members, private plaintiffs may become more willing to pursue RICO's attractive civil remedies in organized crime contexts. It should be remembered, too, that civil RICO has significant deterrent potential when used by institutional plaintiffs, such as units of state and local governments, which are not likely to be intimidated at the prospect of suing organized crime members. Finally, civil RICO's utility against continuous large-scale criminality not involving traditional organized crime elements should be kept in mind. These considerations suggest that private civil RICO enforcement in the area of the organized criminality may have had a greater deterrent impact than is commonly recognized, and that both the threat and the actuality of private enforcement might be expected to produce even greater deterrence in the future. Oversight at 140-41.

Public enforcement with its principal reliance on the criminal law cannot be relied upon to do the whole job of policing fraud. As Justice Jackson observed, "the criminal law has long proved futile to reach the subtler kinds of fraud at all, and able to reach grosser fraud, only rarely." R. Jackson, The Struggle for Judicial Supremacy 152 (Vintage 1941). We must, in short, be candid about the limitations of the criminal justice system in the white collar crime area. Resources available for investigation and prosecution are scarce. The common law criminal trial is ponderous. The cases are complex. Offenders will be most often treated as "first offenders" even if they had actually engaged in a pattern of behavior over a substantial period of time. A few convictions will yield only a minimal deterrent effect. J. Conklin, Illegal But Not Criminal: Business Crime in America 129 (1977) rightly concluded:

> [T]he criminal justice system treats business offenders with leniency. Prosecution is uncommon, conviction is rare, and harsh sentences almost non-existent. At most, a businessman or corporation is fined; few individuals are imprisoned and those who are serve very short sentences. Many reasons exist for this leniency. The wealth and prestige of businessmen, their influence over the media, the trend towards more lenient punishment for all offenders, the complexity and invisibility of many business crimes, the existence of regulatory agencies and inspectors who seek compliance with the law rather than punishment of violators all help explain why the criminal justice system rarely deals harshly with businessmen. This failure to punish business offenders may encourage feelings of mistrust toward community morality, and general social disorganization in the general population. Discriminatory justice may also provide lower class and working class individuals with justifications for their own violation of the law, and it may provide political radicals with a desire to replace a corrupt system in which equal justice is little more than a spoken ideal. (citations omitted).

Public agencies, moreover, will never be funded at adequate levels. The funding of the Securities and Exchange Commission, for example, has increased since 1979, but its staffing has decreased, and its pending investigations are down. The SEC's annual budget is only $137 million, which is a little less than 25% of Michael Milken's 1987 salary and bonuses. Wall Street Journal, March 31, 1989, p. 1., col. 4. Yet the number of shares traded on the New York Stock Exchange has shot up 300% since 1977; the number of first time registrants has increased by 260%. See generally "Desperate SEC Seeks More Aid," National Law Journal, May 1, 1989, p. 1, col. 3 (analysis of size of market, number of transactions, dealers, and staff resources over 10 years) ("agency . . . becom[ing] dangerously unable to keep pace"); Statistics on SEC's Enforcement Program, GAO Report Mar. 25, 1985. Even among legitimate brokerage firms, the incentive structure for commissions encourages a fraud known as "churning," trading stock without regard for investment objectives. Similarly, the futures industry in the United States has grown tremendously in recent years. The 139.9 million futures contracts traded in 1983 represents a level of trading activity 15 times greater than that reached in 1968. The value of contracts traded exceeds $5 trillion a year. Nevertheless, the resources of the Commodities Futures Trading Commission have remained relatively constant. Its annual budget is only $36.5 million. USA Today, April 5, 1989, Sec. B, p. 1, col. 1. In 1983, it was suggested that the industry was a scandal waiting to happen, for the Commission was thoroughly out-gunned in the ongoing battle against commodity fraud." S. Rep. No. 97-495, 97th Cong., 2d Sess. 10 (1983). The recent developments in Chicago and New York are that scandal. See N.Y. Times, Feb. 24, 1989, p. 35, col. 5 (regulation of futures industry questioned by Government Accounting Office study in light of pending F.B.I. investigation of allegations of wide-spread fraud); id., Feb. 20, 1989, p. 22, col. 4 (facts of F.B.I. investigation in Chicago reviewed). See also N.Y. Times, May 10, 1989, p. 29, col. 3; id., May 9, 1989, p. 33, col. 1; id., May 5, 1989, p. 29, col. 6 for an analysis of a developing investigation into fraud on the New York commodity exchanges.

The accounting industry, too, once thought to play the role of an outside watchdog, is under heavy competitive pressure to go along with questionable annual reports, and it is increasingly losing its independence, since it also offers management consulting advice. See N.Y. Times, Feb. 21, 1985, col. 1, p. 446. (remarks of Rep. John D. Dingle). "After a spectacular string of corporate failures and financial scandals in recent years, the industry that is supposed to audit company books and sniff out chicanery" is itself coming under close scrutiny. Time, Apr. 21, 1986 at 61. The General Accounting Office is sharply critical of the accounting profession for its role in failing to uncover the wide-spread fraud and mismanagement that is contributing to the multi-billion savings and loan association scandal. See 3 Corporate Crime Reporter, Monday, Feb. 20, 1989, p.4 (11 S & L audits showed positive net worth of 44 million, but within 5 to 17 months, each had collapsed, and they showed negative net worth of 1.5 million). See also Wall Street Journal, May 9, 1989, p. 1, col. 6 (analysis of fraud by auditor in Ramona Savings & Loan Association, in which federal fund out $65.5 million). The Federal Home Loan Bank Board is suing 10 accounting firms, including Cooper & Lybrand, Grant Thornton, and Touche Ross, which audited failed thrifts. N.Y. Times, March 12, 1989, Sec. 3, p. 1., col. 2. "Some auditors may have been too close to their clients and allowed them to do things that they shouldn't have done. I'm not sure the industry was as independent as it should have been," observes Arthur Bowman, the editor of Bowman Accounting Report, an Atlanta based newsletter. Id. at p. 10, col. 1. Indeed, the Big Eight, insiders say, are agreeing not to testify against one another. Id. No wonder that the accounting profession is a major contributor to the political campaigns of those in the forefront of the effort to disembowel RICO. Rolling Back RICO, National Journal, Sept. 6, 1986 p. 2114-15. Theodore C. Barreaux, Vice President of the American Institute of Certified Public Accountants, attributes the Department of Justice's switch in 1988 from opposition to support of the prior criminal conviction limitation on RICO to a series of meetings between accounting institute lawyers and Department officials. Id. at 2115. Drexel Burnham Lambert, Inc., too, has put $250,000 into the anti-RICO campaign. Forbes, Oct. 17, 1988, p. 12, col. 1. The need for more effective deterrent to fraud in the world of legitimate business is, therefore, manifest.

9.1 Myth: Multiple Damage Suits Are Not Needed.

See Oversight at 177-78 (remarks of Charles L. Marinaccio, Securities and Exchange Commissioner):

> The RICO civil remedy may substantially alter the balance of private and public rights and remedies under the securities law that Congress and the courts have carefully crafted over the last 50 years. . . . [I]t enables plaintiffs to claim treble damages even in cases where Congress has expressly limited recovery under the securities laws to actual damages. xxx [The Securities Acts private claims for relief] have served well [with only actual damages] as supplements to other enforcement mechanisms. . . .

9.2 Fact: Multiple Damage Suits Are The Heart of the Necessary Private Enforcement Mechanism.

It is, of course, correct that the Securities Acts only provide for actual damages. It can hardly be contended, however, that they have worked as an adequate compensatory scheme or mechanism for the deterrence of systematic fraudulent practices in light of the recent inside information trading scandals. The Wall Street Journal, Feb. 17, 1987, col. 1, p. 27 aptly observed:

> [T]he abuse of inside information in the take-over game is endemic and has grown

> systematically over the past half-decade. . . .
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> Whatever specific numbers come out in the unfolding federal probe, it's probably a safe bet they they'll vastly understate the total losses incurred by stock-market investors, as well as many target companies that no longer exist and their acquirers, who doubtless paid too dearly for them.

The need for a strengthened private enforcement mechanism, including multiple damages, is manifest. When Michael Milken was indicted, acting United States Attorney Benito Romano observed, "the three-year investigation has uncovered substantial fraud in a very significant segment of the American financial community. A serious problem has infected Wall Street." N.Y. Times, March 30, 1989, p. 1, col. 1. The stock market and the futures market only operate well when people have confidence. Small investors today are avoiding the market. N.Y. Times, April 21, 1989, p. 30, col. 2. Households today own 58.5% of United States stocks compared with 82.2 in 1968. Wall Street Journal, March 28, 1989, p. C1, col. 2. Ms. Windy Gramm, the Chairwoman of the Commodities Futures Trading Commission, put it succinctly, "[I]f customers feel they are being ripped off by an exchange or that the exchange is not vigilant against fraud, they will leave the markets." N.Y. Times, March 26, 1989, p. 11, col. 1.[4]

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[4] Benjamin Stein, Barron's, April 3, 1989, p. 24, col. 1, summed up the charges against Milken:

> Michael Milken has been charged with a variety of crimes. But almost all of them had a common theme--the perversion and betrayal of principals by agents, the abuse of those who placed their trust by those in whom they placed their trust . . .
>
> The capitalist system, which has done so well for most Americans, is based on the notion that principals can trust their agents . . . . If that trust is a joke, then the whole system is handicapped, not least by investors reluctance to invest.
>
> But according to the indictments . . . Milken and his co-indictees took advantage of the trust placed in them as agents by their corporate principals . . . . [C]orporate officers brought him plans for acquisitions and restructurings, all on promise of confidence. Over and over again, Milken bought stock and tipped friends to buy stock in the targets, according to the

The idea of multiple damages for certain kinds of unlawful practices has deep roots. The earliest such provision in English law was the Statute of Gloucester, 6 Edw. 1, ch. 5 (1278) (treble damages for waste). Modern antitrust statutes had their origin in the Statute Against Monopolies, 21 Jac. 1, ch. 3, § 4 (1624) (authorizing treble damages for those injured by unlawful monopolies). Parliament recognized that it was "one thing to pass statutes and . . . quite another thing to insure that [they were] actually enforced." 4 W. Holdsworth, A History of English Law 335 (3d ed. 1945). Accordingly, "it was a common expedient [in the Middle Ages and beyond] to give the public at large an interest in seeing that a statute was enforced . . . ." Id. It was also an idea found in early colonial laws. See, e.g., The Laws and Liberties of Massachusetts 5 (pilfering and theft: treble damages), 24 (gaming: treble damages) (1648). In turn, the idea of multiple damages for various kinds of wrongs was a characteristic feature of Roman law. The "delict" of theft ran back at least to the Twelve Tables (450 B.C.). The Institutes of Gaius (Part I) (Text with Critical Notes and Translation by F. deZulueta) at 217 (1958). "[T]he penalty . . . [was] four times the value of the thing stolen" when the offender was caught in the act; otherwise, it was "double." A. Watson, The Law of the Ancient Romans 76 (1970). Extortion was remedied by four times the loss. Id. at 80. Possession of stolen property was remedied by three times the value of the property. Id. at 77. Greek law provided for double damage if stolen property was recovered; tenfold damages otherwise. 5 C. Kennedy, The Orations of Demosthenes, app. VI 187 (1909) (quoting a law of Solon), quoted in, J. Wigmore, Panorama of the World's Legal Systems 343 (1936). Biblical law, too, reflected multiple damage recovery. Exodus 22:1 (theft of ox or sheep, if killed, restoration of five for ox and four for sheep); Exodus 22:9 (trespass to property

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indictments.

> Those buy orders moved the stock price upwards, often raising the takeover price to his own clients by tens or hundreds of millions of dollars. Conversely, those trades made millions for Milken and his pals . . . Milken made money personally by violating his client's trust and thereby cost his clients, his principals, large bucks . . .
>
> Milken, . . . made himself the principal in a great many cases in which he had been hired to be the agent. This is a basic attack on the credibility of the system, which cannot function without trust between principals and agents, especially at that exalted level.

double damages); 2 Samuel 12:1-6 (restoration of fourfold for taking of lamb).

Modern economic analysis supports the wisdom of this history. See generally, R. Posner, Economic Analysis of Law § 7.2 (3rd ed. 1986). Indeed, a number of federal statutes, particularly in the commercial area, contain treble damage provisions.[5] Professor (now Judge) Posner argues for private enforcement mechanisms of more than actual damages against deliberate anti-social conduct, particularly where the factor of concealment is present. Economic Analysis of Law at 560 (private enforcement); 194, 346 (more than actual damages for deliberate conduct); 293 (concealment). Concealment is the sine qua non of most RICO-type behavior, particularly fraud. See, GAO: Fraud In Government Programs--How Extensive Is It?--How Can it be Controlled? cover page (1980) ("Most fraud is undetected. For those . . . committing fraud, the chances of being prosecuted and eventually going to jail are slim . . . . The sad truth is that crime against the Government often does pay.") If society authorizes the recovery of only actual damages for deliberate anti-social conduct engaged in for profit, it lets the perpetrator know that if he is caught, he must return the misappropriated sums. If he is not caught, he may keep the money. Even if he is caught and sued, he may be able to defeat part of the damage claim or at least compromise it. In short, the balance of economic risk under traditional single damage recovery provides little economic disincentive to those who would engage in such conduct. See R. Posner, Antitrust Law: An Economic Perspective 223 (1976) ("If, because of concealability, the probability of being punished for a particular . . . violation is less than unity, the prospective violator will discount (i.e., multiply) the punishment cost by that probability in determining the expected punishment cost for the violation.") In fact, as the court in Haroco, Inc. v. American National Bank & Trust Co. of Chicago, 747 F.2d 384, 399 n.16 (7th Cir. 1984), aff'd on other grounds, 105 S.Ct. 3291 (1985) observed:

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[5] See, e.g., 12 U.S.C. § 1464 (1982) (Home Owners' Loan Act of 1933); 12 U.S.C. § 1975 (1982) (Bank Holding Company Act); 12 U.S.C. § 2607 (1982) (Real Estate Settlement Act of 1974); 15 U.S.C. § 15 (1982) (Clayton Act: Antitrust); 15 U.S.C. § 72 (1982) (Revenue Act of 1916: Restraints on Import Trade); 15 U.S.C. § 1117 (1982) (Trademark Act of 1946); 15 U.S.C. § 1693f (1982) (Electronic Fund Transfer Act); 15 U.S.C. § 1989 (1982) (Motor Vehicle Information and Cost Savings Act); 22 U.S.C. § 4209 (1982) (Consular Officers: Penalty for exacting excessive fees); 30 U.S.C. § 689 (1982) (Lead and Zinc Stabilization Program); 35 U.S.C. § 284 (1982) (Patents); 42 U.S.C. § 9607 (1982) (CERCLA); 45 U.S.C. § 83 (1982) (Government Aided Railroads); 46 U.S.C. § 1227 (1982) (Merchant Marine Act of 1970).

> [It is also true that] the delays, expense and uncertainties of litigation often compel plaintiffs to settle completely valid claims for a mere fraction of their value. By adding to the settlement value of such valid claims in certain cases clearly involving criminal conduct, RICO may arguably promote more complete satisfaction of plaintiffs' claims without facilitating indefensible windfalls.

Similarly, studies under the antitrust statute show that most treble damage suits are now settled at close to actual damages. Study of the Antitrust Treble Damage Remedy, Serial No. 8, House Comm. on the Judiciary, 98th Cong., 2d Sess. 14 (1984). No reason exists to believe that a similar pattern will not develop under RICO, at least in the fraud area. Ironically, it may be necessary to authorize treble damages to assure that deserving victims receive actual damages. See generally, Note, Treble Damages Under RICO: Characterization and Computation, 61 Notre Dame L. Rev. 526, 533-34 (1986):

> Treble damages have unique characteristics that can be creatively used to address the problems of sophisticated crime. Treble damages can be used to (1) encourage private citizens to bring RICO actions, (2) deter future violators, and (3) compensate victims for all accumulative harm. These multiple and convergent purposes make the treble damage provision a powerful mechanism in the effort to vindicate the interests of those victimized by crime.

10.1 Myth: The Racketeer Label Leads Legitimate Business People to Settle Garden Variety Fraud Claims For Extortionate Amounts.

See 132 Cong. Rec. E. 3531 (Oct. 10, 1986 daily ed.) (remarks of Rep. Frederick C. Boucher):

> [RICO] allows plaintiffs to raise the stakes significantly in . . . [commercial disputes] because a civil RICO claim carries with it the threat of treble damages, attorney's fees, and the opprobrium of being labeled a "racketeer." As Justice Marshall concluded in examining the current situation created by civil RICO:

> Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat.

10.2 Fact: The Racketeer Label Inhibits, Not Facilitates, Settlement; Fraud Is Not a Garden Variety Problem.

Mr. Philip A. Feign, Assistant Securities Commissioner, Colorado Division of Securities, and spokesman for the North American Securities Administrators Association before the Senate Judiciary Committee, aptly observed:

> Euphemisms like "commercial disputes," "commercial frauds," "garden variety frauds" and "technical violations" . . . are sanitized phrases often used by "legitimate businesses and individuals" to distinguish their frauds from the "real" frauds perpetrated by the "real" crooks. Yet all wilful fraudulent conduct has in common the elements of premeditation, planning, motivation, execution over time, and injury to victims and commerce. And it is all crime. Oversight at 535.

On the role of euphemisms in encouraging public and official reluctance to enforce the law and providing rationalizations for the violators themselves in the white-collar crime area, see Task Force Report: Crime And Its Impact--An Assessment: Task Force On Assessment, President's Commission On Law Enforcement And Administration Of Justice 104-08 (1976) ("most white collar crime is not at all morally neutral"); D. Cressey, Other Peoples Money 102 (1952) (that embezzlers rationalize their conduct as different from theft is an important fact in behavior pattern). Indeed, it was persuasively argued in 1934 before the Copeland Committee that it was in part our failure as a society to bring white-collar crime to justice that significantly contributed to the development during prohibition of what all now concede to be organized crime, a problem that did not end with prohibition's repeal:

> Both crime and racketeering of today have derived their ideals and methods from the business and financial practices of the last generation . . . . It is a law of social psychology that the socially inferior tend to ape the socially superior . . . . It was

> inevitable that, sooner or later, we would succeed in "Americanizing" the "small fry"--especially the foreign small fry . . . . All was relatively safe, since the legal profession was already ethically impaired through its affiliations with the reputable racketeers . . . . The idea that when prohibition is ended the racketeers . . . will meekly and contritely turn back to blacking shoes .' . . is downright silly. They will apply the technique they have mastered to the dope ring . . . . They will find crafty lawyers all too willing to defend them from the "strong arm" of the law for value received . . . . So long as the lawless can get protection in return for keeping corrupt politicians in office, we shall not be free from the crime millstone about our necks. Hearings Before a Subcomm. of the Senate Committee on Commerce, 73rd Cong. 2nd Sess. 710-11 (1934) (remarks of Professor Harry Elmer Barnes).

It is simply not true, moreover, that the "racketeer" label results in extortionate settlements. As quoted by Representative Boucher, Justice Marshall suggests that "a prudent defendant, facing ruinous exposure [under RICO] will decide to settle even a case with no merit." 473 U.S. at 478. Accordingly, civil RICO lends itself, he argued, to the very extortive purpose "it was designed to combat." Justice Marshall cites as authority for this extraordinary proposition the Ad Hoc Civil RICO Task Force: Corporations, etc. 69 (1985). The Ad Hoc Task Force, in turn, conducted a survey of 3,200 corporate litigation lawyers, of whom only 350 responded. Two factors, however, undermine the scientific credibility of the general results of the survey: (1) the population questioned was unrepresentative of the bar, and (2) the response rate was insufficient to warrant broad generalizations. More to the point here, the survey did not ask each of the respondents a carefully phrased question calling for their opinion or experience with RICO as a settlement weapon. Instead, the opinion relied upon by Justice Marshall was volunteered by only two of the 350 respondents as grounds for repealing RICO. In fact, it is the experience of a majority of seasoned litigators in the RICO area that adding a RICO claim to a suit does not facilitate settlement; it inhibits it, particularly when a legitimate business is involved. See A Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation: ABA Criminal Justice Section 121-23 (1985).

Generally, businesses wrongfully accused of "racketeering" will not settle suits--even those that should be compromised--as long as the racketeer label is in the litigation. Indeed, it is difficult to understand how Justice Marshall or Representative Boucher could believe that a suit with "no merit" faces a defendant with "ruinous exposure." If the plaintiff's suit has no merit, his chance of success is zero, and zero multiplied by three (or any other number) is still zero. Before anyone accepts the Task Force's, Justice Marshall's or Representative Boucher's claim, he ought to ask for the names of the defendants and the cases allegedly so settled; he should then inquire of the plaintiffs what their evidence was. It is doubtful that it will be found that the litigation was meritless. It is doubtful, in short, that responsible corporate or other defendants are paying off strike suits in the RICO--or any other area--at more than their settlement value, no matter what the theory of the complaint is. Neither the racketeer label nor the threat of treble damages will convince prudent managers to surrender lightly scarce resources, merely because another files a suit. No matter how colorfully it is phrased, the claim that such managers act against their own interest is not credible.

Finally, white-collar crime, principally fraud, is no "garden variety" problem in the United States today. Current estimates put it in the $200 billion range. That figure is similar in dimension to drugs. Hearings before House Subcommittee on Crime, 99th Cong., 2nd Sess. 1 (1986) (remarks of Rep. William J. Hughes) ($110 billion spend annually; lost productivity, etc., $60 billion). Commodities investment fraud, for example, costs $200 million. S. Rep. No. 495, 97th Cong., 2nd Sess. V (1982). Bank fraud, particularly by insiders, is also deeply disturbing. In the 1980-81 period, the failure of 105 banks and savings and loans cost one billion dollars. Roughly one-half of the bank failures and one-quarter of the savings and loan collapses had as a major contributing factor criminal activities by insiders, few of whom, according to the findings of a study by the Bernard Committee, were adequately sanctioned, criminally or civilly. In 1984, the Committee noted:

> Despite such enormous losses, neither the banking nor the criminal justice systems impose effective sanctions or punishment to deter white-collar bank fraud. The few insiders who are singled out for civil sanctions by the banking agencies are usually either fined de minimis amounts or simply urged to resign. The few who are criminally prosecuted usually serve little, if any, time in prison for thefts that often cost millions of dollars. H. R. Rep. No. 1137, 98th Cong., 2d Sess. at 5 (1984).

Since then, the Federal Deposit Insurance Corporation has reported that bank failures, more than 100 per year, continued to run at post-Depression record levels. N.Y. Times, Jan. 5, 1987, col. 1, p. 20. Most banks, in fact, do not have the financial resources or the expertise to protect themselves from sophisticated schemes to defraud. According to recent testimony of the F.D.I.C., 97% of the federally insured banks have assets of less than $500 million; 84% less than $100 million; 66% less than $50 million. Oversight at 216.

In 1988, the Bernard Committee reaffirmed and went beyond its basic 1984 findings. H.R. Rep. No. 100-1088, 100th Cong., 2d Sess. 11 (1988) (1/3 of banks and 3/4 of the thrifts failures linked to misconduct).

Attorney General Richard Thornberg concurs; he told the Senate Banking Committee on Feb. 10, 1986, that 25 to 30% of all thrift failures was attributable to fraud; in 1988 alone, it accounted, he said, for $2 billion in losses. Yet, he reported, only 172 individuals had been convicted, and few received sentences in excess of 12 months, while most received probation and community service. See N.Y. Times, Feb. 10, 1989, p. 29, col. 3. "When [judges] see nicely dressed bankers, it is difficult to send them away for a long time," commented Rosemary Steward, the Director of Enforcement at the Home Loan Bank Board. Id. The Attorney General also lamented, "I think we'd be fooling ourselves to think any substantial portion of those assets are going to be recovered." Id. See also Wall Street Journal, Feb. 10, 1989, p. 1., col. 1 (negative evaluation of success of Dallas Bank Task Force). Finally, criminal and civil RICO is being used by the Department of Justice and the banking agencies in the thrift crisis. See, e.g., Pusey, "Fast Money and Fraud" N.Y. Times Magazine, April 23, 1989, p. 30. (analysis of facts of prosecution and civil suits under RICO involving the Empire Savings & Loan Association in Dallas, Texas). Nothing should be done that would undermine the effectiveness of RICO in this crucial area.

The bank and savings and loan crises on the federal level is paralleled at the state level by the collapse of insurance companies. From 1969 through 1983, state guarantee funds assessed healthy insurers only $454 million to cover claims of insolvent members. N.Y. Times, April 5, 1989, p. 33, col. 1. But in 1987, 234 companies were in liquidation, and 74 companies were in reorganization. Wall Street Journal, Nov. 8, 1988, at A.6. State guaranty funds paid out in 1987 a record $909 million to bail out the failures. Id., Feb. 17, 1989, p. 1, col. 6. "Autopsies of several failed insurers across the country have turned up evidence of frauds and inadequate regulations." Id. "[T]he indirect cost to taxpayers already is growing, because insurers deduct from state taxes their rising assessments from guaranty funds." Id. A special report by Arthur Anderson & Co. concluded that "a noticeable number of insurance company insolvencies [would occur] over the next five to seven years." Id. The industry holds a large portion of the "junk bonds" issued by corporate America as well as a large portfolios of real estate, each of which is particularly vulnerable to an economic down turn, as in the savings and loan crisis. See N.Y. Times, April 5, 1989, p. 33, col. 1.

The insurance industry is also facing a "what may become the biggest financial scandal in the history of Medicare: the misspending of as much as $10 billion in Medicare funds over the past six years." Wall Street Journal, April 7, 1989, p. 1., col. 6. The subjects of the developing investigation by the Department of Justice include some of the nations biggest insurance companies. During the same period, America's elderly saw their annual deductible in hospital care and doctor care more than double. Id.

Ultimately, most of the costs of fraud are passed on to the rest of society. Indeed, the "insurance crisis" that has led legislatures to rewrite our liability laws to curtail personal injury litigation might be better dealt with by enforcing vigorously our laws against fraud, for the insurance industry loses more than twice as much each year from fraud as it says it lost overall, for example, in 1986 because of the crisis in personal injury litigation. N.Y. Times, Mar. 2, 1986, col.1, p. 20 (industry spokesmen say it lost $5.5 billion; consumer spokesmen say it made $1.7 billion) with N.Y. Times, Feb. 9, 1987, col. 1, p. 1 (insurance crisis ended with insurance generally available, although at higher rate, and the industry is profitable again). While the cost of vexatious litigation is generally spread throughout society by directors and officers liability insurance, too often the cost of fraud is not shared through various kinds of insurance, and it rests on the shoulders of the victim, who can ill-afford to carry or sustain it. Indeed, in light of Ohio's experience with the failure of E.S.M. Government Securities, Inc., including a paid-for false audit report, and the repercussions it caused in the savings and loan industry and on the gold market, no one ought seriously to contend that such fraud is a "garden variety" problem, which may be "weeded out" with business-as-usual legal techniques. See Chicago Tribune, Jan. 27, 1987, col. 1, p. 2 (estimated $315 million loss in E.S.M. scandal). In addition, the collapse of the E.S.M. Company led to the insolvency of Home State Savings Bank in Ohio and the shutdown of 69 privately insured thrift institutions. Subsequently, the accounting firm of Grant Thornton reached a $22.5 million settlement with the American Savings and Loan Association, which lost $55.3 million; it also reached a $50 million settlement with 17 municipal governments, which sued under RICO. N.Y. Times, Sept. 17, 1986, col. 6, p. 48. Without RICO, it is doubtful that such a favorable settlement could have been obtained for at least some of the victims.

11.1 Myth: Private Civil RICO Might not Lend Itself to Sensible A Construction, Since It was an Ill-Designed Afterthought to a Criminal Statute.

See, e.g., P.M.F. Services v. Grady, 681 F. Supp. 549, 555-86 (N.D. Ill. 1988) (Shadur, J.):

> [Civil RICO] was a late edition, spot-welded to an already fully-structured criminal statute . . . .

11.2 Fact: Private Civil RICO was Part of the Design of The Statute from the Beginning.

P.M.F. Services was written by Judge Milton Shadur. His views of the legislative history of Civil RICO, which were first expressed in Kaushal v. State Bank of India, 556 F. Supp. 576, 581-84 (N.D. Ill. 1983), were followed by the Second Circuit in Sedima S.P.L.F. v. Imrex Co., 741 F.2d 482, 488-90 (2d Cir. 1984) ("endorsed"), rev'd. 473 U.S. 479 (1985). Their "precedential value however, . . . is [now in] considerable doubt . . . [because of] the Supreme Court's total rejection of the conclusions drawn . . . from . . . [Shadur's] historical analysis of . . . RICO " in Sedima. Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1081 (9th Cir. 1986), cert. denied, 107 S. Ct. 1336 (1987). They are also plainly wrong.

In 1967, the President's Commission on Law Enforcement and Administration of Justice recommended the adoption of antitrust type remedies to control sophisticated forms of crime. Challenge of Crime in a Free Society, 208 (1967). Bills were introduced in the Senate and House; they included the private enforcement provisions. See, e.g., S.2048, 90th Cong., 1st Sess. (1967); 113 Cong. Rec. 17,999 (1967). The American Bar Association testified in the Senate in favor of the treble damage remedy. Senate Hearing 259 (statement) 556 report) (1969). The President, at that time, added his favorable voice for the treble damage remedy. Id. at 449. The Senate passed the bill, of course, with only express government criminal and civil relief, but it is likely a private claim for relief for actual damages would have been implied in the statute based on 1970 jurisprudence. Compare J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (private remedy implied under § 27 of Securities Act of 1934) with Merrill Lynch Pierce Fenner & Smith v. Curran, 456 U.S. 353, 378 (1982) (jurisprudence at time of legislation not later governs implications). Nevertheless, when the Bar Association testified in the House (House Hearings 543-44) that the private enforcement mechanism should be added back, it was restored to the bill, accepted by the Senate, and signed by the President. Contrary to Judge Shadur's conclusion in P.M.F. Services, RICO is not, in short, a criminal statute with an ill-designed treble damage afterthought. See Iannelli v. United States, 420 U.S.

770, 786-89 (1975) ("a carefully crafted piece of legislation"); 116 Cong. Rec. 35, 204 (1970) (remarks of Rep. Robert McClory) ("no single measure received more thorough consideration"). Right from the beginning, Senator Roman Hruska, one of RICO's principal sponsors, recognized that its "criminal provision . . . [was] intended primarily as an adjunct to the civil provision," which he "consider[ed] . . . [one of] the more important features" of the bill. 115 Cong. Rec. 6993-94 (1960); 115 Cong. Rec. 602 (1970) (remarks of Sen. Hruska) ("the principal value of this legislation may well be found to exist in its civil provisions"). *See also* *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 107 S. Ct. 2759, 2764 (1987) ("private attorneys general [for] a serious national problem for which public prosecutorial resources are deemed inadequate"); *Shearson/American Express Inc. v. McMahon*, 107 S. Ct. 2332, 2345 (1987) ("vigorous incentives for plaintiffs to pursue RICO claims"); *Sedima*, 473 U.S. at 493 ("private attorney general provisions . . . designed to fill prosecutorial gaps"). Judge Shadur is just flatly wrong.

Judge Shadur's views on RICO, too, are often reversed or rejected by the Seventh Circuit, which knows his work best. *See, e.g.*, *United States v. Yonan*, 623 F. Supp. 881, 883-86 (N.D. Ill. 1985) (construction of "associated with"), *rev'd.*, 800 F.2d 164, 167-68 (7th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987); *Northern Trust Banks/O'Hare v. Inryco*, 615 F. Supp. 828, 831 (N.D. Ill. 1985) (single scheme "construction of pattern"), *rejected by* *Morgan v. Bank of Waukegan*, 804 F.2d 970, 973-77 (7th Cir. 1986) (reversing 615 F. Supp. 836) (Shadur, J.). Judge Shadur's single scheme decision on "pattern" will also be soon rejected by the Supreme Court in *H.J. Inc. v. North Western Bell Telephone Co.*, 829 F.2d 648, 650 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988). Typically, Judge Shadur's analyses are not only wrong, but also superficial. *Compare*, *P.M.F. Services*, 681 F. Supp. 549, 555 n.15 ("no other private civil cause f action [other than RICO] embedded in the body of federal statutes labeled "'Crimes and Criminal Procedure'") *with* 18 U.S.C. § 2520 (recovery of civil damage for unlawful wire tapping).

IV. *Conclusion*.

The President told the Nation on February 6, 1989, that "unconscionable risk-taking, fraud and outright criminality . . . [were] factors" that led to the savings and loan crisis. *N.Y. Times*, Feb. 7, 1989, p. 31, col. 1. He promised that the Government would "seek out and punish those that have committed wrongdoing in the management of . . . [the] failed institutions." *Id.* He would, he said, as a "solemn pledge," make "every effort to recover assets diverted from these institutions and to place behind bars those who had caused losses through criminal behavior." Id.

It is interesting now, however, to read the President's lips, since his Administration announced its position on RICO Reform.[6]

But it is difficult to accept its position of a general roll-back for the rights of victims of crime!

It is difficult, too, to accept, without substantial modification, the provisions of the RICO Reform Act of 1989.

G. Robert Blakey
Notre Dame Law School
June 7, 1989

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[6] H.R. 1046 "represents the general approach to RICO reform that we have come to prefer . . ." Testimony of Department of Justice, Subcommittee on Crime, House Committee on Judiciary (May 4, 1989).

Appendix A: Chart Comparing RICO Reform Act of 1989 and Present Law

Draft of June 7, 1989

RICO Reform Act of 1989

Introduction

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as The Racketeer Influenced and Corrupt Organizations Statute or "RICO" (18 U.S.C. § 1961 et seq.). RICO prohibited "enterprise criminality", that is, "patterns" of "racketeering", including:

(1) violence,
(2) the provision of illegal goods and services,
(3) corruption in government, or unions, and
(4) criminal fraud,

by, through, or against various kinds of "entities."

Licit entities include corporations, partnerships, unions and governmental entities.

Illicit entities include organized crime and violent crime groups.

In addition to criminal sanctions, the statute authorized governmental civil suits and a treble damage claim for relief with counsel fees for injury to business or property for victims of RICO violations.

RICO Reform Proposals

Various proposals to reform RICO have been made in the past several Congressional sessions. Some reflected an effort to strengthen the statute. See H.R. 4920 100th Cong. (Conyers-Edwards); H.R. 3240 100th Cong. (Conyers-Edwards). Other reflected an effort to circumscribe it, particularly in the area of private civil litigation. See S. 1523, 100th Cong. (Metzenbaum); H.R. 2983 100th Cong. (Boucher); H.R. 4923 100th Cong. (Boucher).

S.1523, sponsored by Senator Howard Metzenbaum, was reported, as amended, by the Senate Judiciary Committee to the full Senate on May 24, 1988. S. Rep. No. 100-458, 100th Cong., 2nd Sess. (1988) When it was introduced, it was similar to H.R. 2983.

H.R. 4923, sponsored by Congressman Rick Boucher, was introduced on June 28, 1988. It was identical to S. 1523, as reported by the Senate Judiciary Committee.

H.R. 4920 was introduced by Congressmen John Conyers and Don Edwards on June 28, 1988. It was similar in structure to S. 1523, as reported, but it also reflects many of the provisions of H.R. 3240.

S. 2793, 100th Cong. (Senator Biden and others) would have created a new federal anti-corruption statute, applicable to Federal, state, and local corruption.

None of this proposed legislation passed in the 100th Congress.

The RICO Reform Act of 1989 (S.439/H.R. 1046) was introduced in February 23, 1989, by Senator Dennis DeConcini and Congressman Rick Boucher.

Summary of Various Reform Proposals on Twenty-nine Issues

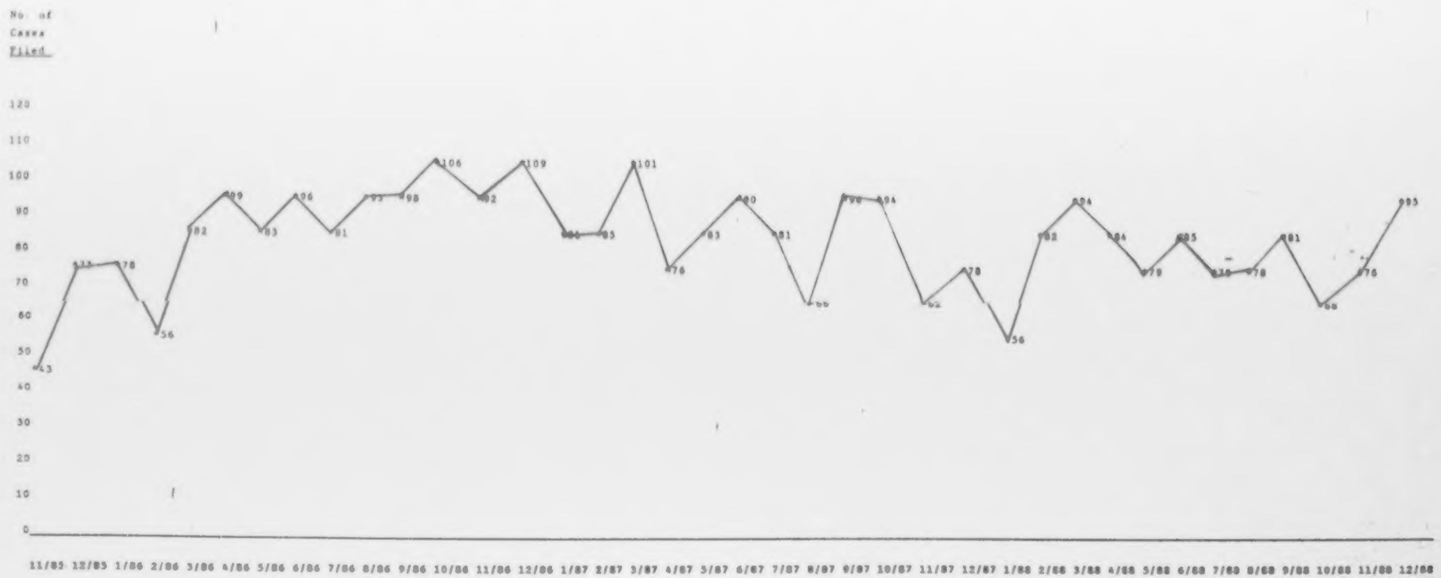
Issues	RICO Reform Act of 1989	Present Law
1. Findings	no provision	limited findings
2. Burden of proof for government civil suits for equity relief	preponderance	preponderance
3. Government related suits for damages (Federal, state, local and government corporations, insurance liquidators and Indian tribes)	automatic 3x; brought by chief legal officer, but no insurance liquidator or Indian tribe	not clear Federal, but otherwise automatic 3x
4. private suits for damages (general rule)	actual damages, but no counsel fees	automatic 3x and counsel fees
5. private suits for damages (exceptions)	optional 2x punitive with counsel fees: 1. unit of local government 2. natural person (consumer) 3. insider trading if victim: a. natural person b. charity c. investment trustee d. welfare/pension fund, or e. investment companies 4. individual conviction of crime (3x) limited by clear and convincing evidence and other standards (Note: no secondary liability provided)	no exceptions
6. private suit for personal injury	optional 2x punitive with counsel fee	not authorized
7. statute of limitations	private: 4 yrs public: 6 yrs	private : 4 yrs public: not clear
8. defense of good	provision	present, but matter

Issues	RICO Reform Act of 1989	Present Law
faith		of case law
9. evidence of punitive damages	restricted until liability	no provision
10. evidence relating to free speech	no provision	not clear
11. abatement	provision	not clear
12. survival in bankruptcy	provision for actual	not clear
13. limitation of "racketeer" label to crime of violence	provision	none
14. penalty for death (life imprisonment)	no provision	20 years, or for life, if predicate offenses authorize life
15. additional predicate offenses in areas of violence, illegal goods and services, corruption, and criminal fraud	some	n.a.
16. international service of process	provision	no provision
17. exclusive federal jurisdiction	provision	not clear, but trend concurrent
18. effective date	retroactive on measure of damages, except clearly unjust	n.a.
19. equity relief	no provision	not clear, but trend against
20. labor disputes	no provision	applicable
21. pleading	particularity	particularity for conspiracy and fraud
22. parens patriae	no provision	not clear, but trend against

Issues	RICO Reform Act of 1989	Present Law
23. pre-judgment interest	no provision	not clear
24. voluntary arbitration agreements	no provision	voluntary arbitration of all claims;
25. resolution of conflicting opinions	no provision	n.a.
26. conforming amendment	no provision	n.a.
27. securities and commodities	excluded	included
28. criminal conviction 3x	provision	n.a.
29. provisional remedies	no provision	state by state procedure

Appendix B: Chart of RICO Civil Filings, November, 1985 - December, 1988

RICO Cases Filed November, 1985 - December, 1988



Total
37 months - 3132
(85) per month

Senator Dennis DeConcini

To Mr. Blakey:

1. Mr. Blakey, you are a Professor of Law at Notre Dame University. However, it is also my understanding that you are a partner in a law firm, and as such your services are retained by parties in civil RICO litigations. To assist the Committee members to more fully distinguish your role as an academic whose interest in the RICO statute is purely analytical from your role as an advocate whose interest is financial, would you please provide the committee with the names of cases in which you have been retained in which a civil RICO count formed or forms a part of the complaint.

2. You include a statement from The New York Times in your written testimony which states that retroactive relief by Congress is unfair because "Congress would turn itself into a partial substitute for impartial courts." Doesn't S. 438, by leaving the issue of retroactivity specifically to the courts, remove Congress as a substitute for the courts?

3. In your written testimony you state that S. 438 would "in most litigation. . . apply its provisions retroactively to

pending litigation." This is an overstatement of what S. 438 will do. In fact, if this legislation is enacted into law, it will not be applied to any pending case in which the Federal government, all state governments, or all units of general local government are plaintiffs. It will not be applied to any pending case in which the plaintiff meets the bill's definition of a consumer. It will not be applied to any pending case in which the defendant has been convicted or plead guilty to a felony. It will not apply to any pending case in which a settlement has been reached or a final judgment has been entered or the case is on appeal. It will not apply to any pending case in which the plaintiff is alleging damages resulting from violation of insider trading laws. And in that portion of cases in which the new provisions of the law would apply, the plaintiff has an opportunity to persuade the court not to apply the provisions. Why do you view that as being unfair?

4. In your written testimony you state that S. 438 "in most litigation. . . would exclude the securities and commodities industries from the scope of the 1970 Act." In fact, the federal government, all state governments, and all units of general local government can continue to bring treble damage suits against securities and commodities firms. Any person can bring a treble damage suit against a securities or commodities firm for fraudulent conduct if the firm has been convicted or

plead guilty to a felony based on that same conduct. A defined group of plaintiffs can bring multiple damage suits against a securities or commodities firm that violates insider trading laws. Any plaintiff can bring a RICO action against a securities or commodities firm for actual damages. This seems to me to be a significant group of cases, hardly providing the basis for you to say that S. 438 would exclude the securities and commodities law from the scope of civil RICO. Isn't that true?

Thurmond

QUESTIONS FOR MEMBERS OF PANEL IV

1. With regard to pending cases, do you feel that the language in this proposal is adequate to allow continued pursuit of treble damages for meritorious RICO actions? Why or why not?

2. Along with any effort to amend RICO, do you feel that it is appropriate to require a standard of more culpability for the award of punitive damages?

3. How do you respond to the assertion by the Department of Justice in their testimony last year that there was a pressing need for civil RICO reform because the statute was being abused by private plaintiffs?

Notre Dame Law School
Notre Dame, Indiana 46556

Direct Dial Number
219-239-5717

July 28, 1989

Honorable Dennis DeConcini
United States Senate
Judiciary Committee
Washington, DC 20510

Re: Racketeer Influenced and Corrupt Organizations (RICO)

Dear Senator Deconcini:

This is in further reply to your letter of June 13 in reference to the caption matter.

I

You submitted to me several additional questions, copies of which are attached.

Additional Questions of Senator DeConcini

1. Following the Committee hearing on June 7, 1989, you told me that you had decided not to ask me about any litigation that I might be involved in outside of my teaching duties here at the Law School, where I am employed full time and teach the normal load of courses, including Federal Criminal Law, the principal focus of which is on sophisticated criminal and civil litigation in the organized and white-collar crime areas. I welcome, however, the opportunity to include in my testimony, in response to your written request, the additional information about my outside activities that you now think would be helpful to the Committee in evaluating my testimony.

My outside activities relating to RICO are extensive. I will try to summarize them. My involvement in RICO litigation is so extensive that it is impractical to identify each case. I will try to categorize them.

From 1960 and 1964, I was a special attorney in the Organized Crime and Racketeering Section of the United States Department of Justice. In 1966 and 1967, I was a consultant to the President's Commission on Crime and Administration of Justice and the National Commission on the Reform of Federal Criminal Law. These two Commissions evaluated the record of the Department in investigating and prosecuting organized crime and white-collar crime. In major part, RICO grew out of studies and recommendations of these Commissions. From 1969 through 1972, I was the chief counsel to the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, which was then chaired by the late Senator John L. McClellan. RICO was processed by the Subcommittee. Senator McClellan, Senator Roman Hruska, and Congressman

Richard Poff were the chief sponsors of RICO. In particular, RICO grew out of Senator McClellan's long concern with various forms of organized crime and labor corruption.

I have testified on RICO before the Senate Committee on the Judiciary on a number of occasions since 1970: once in connection with the its codification project, another time on forfeiture. I worked with Department of Justice personnel and the Senate Judiciary Committee staff when the 1984 forfeiture amendments were passed. I have also testified on RICO before the Senate Permanent Subcommittee on Investigations. I have, of course, testified in the RICO Reform hearings held over the past several years in the Senate and House of Representatives.

I worked as a counsel to the Senate Committee on the Judiciary for Senator Biden, when he was the ranking minority member. RICO came up in the white-collar crime hearings, which focused on the bank fraud prosecution of the E. F. Hutton Company.

I also worked last year as a consultant on RICO for the House Judiciary Committee for Congressmen Rodino and Conyers.

I have lectured on RICO for a number of years in judicial seminars for the Administrative Office of the United States Courts. The seminars have been held for circuit and district courts and magistrates.

I have lectured on RICO to groups from the Department of Justice and United States Attorneys Offices and federal public defenders. I have also lectured on RICO throughout the United States in continuing legal education programs sponsored by Federal and state bar associations, law schools, and private groups.

I am also the vice chairman and a member of the RICO Cases Committee of the Section on Criminal Justice of the American Bar Association.

Twenty-eight states now have legislation similar to RICO. I have worked with the sponsors in the legislatures in about half of those states. I have worked with groups in states where the legislation was not adopted. Some of this work has been for pay; most of it has been for expenses only. I have also worked with state legislatures on other organized crime related legislation besides RICO , including electronic surveillance, immunity, grand juries, etc. Currently, I am working on RICO legislation for Massachusetts.

Steve Twist, from the Attorneys General office in Arizona, asked me to give you a list of the 28 states. Attached is a chart analyzing the state legislation.

I have also worked on RICO issues for foreign jurisdictions. I have worked on RICO for the Ministry of Justice in Canada and the Attorney General's Office in Puerto Rico. Currently, I am working with the Government of Jamaica on RICO. My work with Jamaica is sponsored by the Department of State.

I have helped with criminal prosecutions under RICO at the state level. I have represented defendants indicted under Federal RICO. I have also represented defendants in Federal criminal prosecutions that raised questions under other legislation that I helped draft while I worked for the Senate Judiciary Committee.

I have represented in Civil RICO litigation states, counties, and cities acting as a plaintiff. In this connection, I have appeared in district courts and filed briefs in circuit courts and the Supreme Court.

I have represented in Civil RICO litigation government corporations acting as plaintiffs. I have represented in Civil RICO litigation private individuals, corporations, churches, banks, thrifts, insurance companies, accounting firms, and labor unions acting as plaintiffs and as defendants.

I have only brought litigation against securities dealers; I have never defended a securities dealer.

I am under contract to write a book on RICO. The manuscript is substantially complete.

I am not a plaintiff or a defendant in any pending RICO litigation. Nor have I been in the past.

It would be appropriate if this question were asked of the other individuals who testified before the Committee. One is the principal architect of one of the most prominent pieces of Civil RICO litigation brought in connection with a labor dispute. Another is a member of a law firm that is a defendant in a pending Civil RICO suit involved in a failed thrift. Similarly, it would be helpful if the groups that appeared were asked to disclose the involvement of their membership as plaintiff or defendant.

2. and 3. It is true that S.438 leaves the ultimate decision on retroactivity up to the district courts. The standard employed ("clearly unjust"), however, gives little guidance to litigants or courts, and in light of the general hostility of the district courts to Civil RICO, it does not take much imagination to figure out how most district courts would probably exercise their discretion.

In 1970, Congress "promised" automatic treble damages to all victims of sophisticated patterns of criminal conduct if they sued and won under RICO. I continue to think that breaking that promise now, even under the mitigated circumstances of the proposed legislation, would be unfair.

4. Please see my detailed comments on the general securities and commodities exclusion in the proposed legislation.

Additional Questions of Senator Thurmond

1. No. Please see my detailed analysis of treble damages and the proposed legislation.

2. No. Please see my detailed analysis of punitive damages and the proposed legislation.

3. Department of Justice is largely uninformed about private litigation under Civil RICO.

II

Amendments to the Proposed Legislation

During my testimony before the Committee, you indicated that your mind was not made up, that the proposed legislation was not a "done deal," and that you would consider amendments to it.

Enclosed is a detailed analysis of the proposed legislation. It establishes that the legislation embodies profoundly unwise policy choices, is unclear and ambiguous in its draftsmanship, and does not consider major issues that warrant congressional attention.

Three issues are of particular concern to me--

1. "Pattern" in light of the Supreme Court's decision in the H.J., Inc. appeal,

2. "Necessities" in light of the Supreme Court's decisions in Caplan & Drysdale and Monsanto, and

3. "Demonstrations" in light of the Supreme Court's decision in the Webster appeal.

These issues are of such major importance that it would be appropriate to hold additional hearings on how the Congress should respond legislatively, especially since these decisions were handed down after the June 7, 1989 hearing.

Enclosed with the detailed analysis are a series of amendments to the proposed legislation and two alternative drafts. One draft attempts to work with the basic design of the proposed legislation. The other draft proposes an alternative design.

I would be glad to work with you in any way possible to reform RICO, so that it works to achieve justice.

III

During the course of the hearing, you asked me to comment on RICO litigation involving the First Community Bankshares, Inc. of Princeton, West

Virginia. I wrote Mr. James L. Harrison immediately after the hearing to obtain the complaint and other papers filed in the case. Mr. Harrison has not yet responded.

IV

It may be appropriate for me to end this letter on a philosophical note. Law is always more than rules and procedures, statutes and decisions, or courts, legislatures, and lawyers. Ultimately, it is an ideology, that is, a set of beliefs and a system of integrated values that express a nation's view of justice. Law used to rest on religion or morals, matters on which we no longer share a consensus. Today, it rests on the consent of the governed. As such, its legitimacy is ever in question. Increasingly, large segments of our society no longer feel included. Opportunity is denied to them, as they have neither adequate education nor meaningful work. Property and power are not distributed, as they once were, more or less evenly throughout our society. Sometimes, it seems, law is all that holds us together. When power is abused in our society, the powerless have only law for recourse. The great statutes that Congress enacted in the past, the anti-trust statutes, the securities statutes, etc., were, at bottom, designed to secure power for the powerless, in those cases, freedom and integrity in the market place. RICO was drafted in that tradition. No law is perfect, or beyond legitimate reform, including RICO. But I emplore you to exercise care, lest you so alter it that you do not right wrong, but do wrong. How you reform RICO will write into law your view of justice. Make it one that reflects the interests, not only of the powerful, who can take care of themselves, but also of the others, who have only people like you and the law to look to.

V

In your letter of June 13, 1989, you indicated that I would be receiving a copy of my testimony to make necessary corrections. It has not yet arrived.

VI

Please include this letter and its attachments in your hearing record at the conclusion of my testimony.

Thank you.

Respectfully,

G. Robert Blakey
O'Neill Professor of Law

Enclosures

APPENDIX A

STATE RICO SURVEY		Federal	Hawaii
EFFECTIVE		October 15, 1970	May 19, 1972
AMENDED		October 1, 1979	Approved June 9, 1988 Effective June 9, 1988
CRIMINAL ACTION	1. Proceeding allowed	Yes 18 Sec. 1961	Yes 207.350
	2. Brought by		
	AG	NP	NP
	DA	NP	NP
	3. Court	NP	NP
ACTS	4. Prohibited Activities		
	- investment of $ from pattern or debt	Yes 1962(a)	Yes 842-2(1)
	- investment or control through pattern or debt	Yes 1962(b)	Yes 842-2(2)
	- participation through pattern or debt	Yes 1962(c)	Yes 842-2(3)
	- conspiracy to do the above	Yes 1962(d)	NP
	5. Pattern	2 rel., 1 after eff. date, 1 w/in 10 yrs of prior excluding imprisonment 1961(5)	NP
	6. Predicate offenses	Yes 1961(1)	Yes 842-1
	7. Person	Yes 1961(3)	Yes 842-1
	8. Enterprise	Yes 1961(4)	NP
	9. State of mind	NP	NP
SANCTIONS	10. Sanctions		
	- imprisonment	Up to 20 yrs, 1963(a)	842-3; more than 10 yrs
	- fine	Up to $25,000, 1963(a)	842-3; more than 10 yrs
	- forfeiture	Yes 1963(a)	Yes 842-3
	- costs	NP	NP
	11. Injunctive relief		
	- restraining order	Yes 1963(b)	NP
	- racketeering lien	NP	NP
CIVIL SUIT	12. Proceeding allowed	Yes 1964	Yes
	13. Brought by		
	- AG	Yes 1964(b)	Yes 842-5,-6,-8(b)
	- DA	NP	NP
	- Private Party	Yes 1964(c)	Yes 842-8(c)
	14. Court	U.S. Dist. 1964(a)	Circuit 842-5,-6,-8
	15. Burden of Proof		
	- Law	NP	NP
	- Equity	NP	NP
	16. Provision for innocent parties	Yes 1964(a)	Yes 842-8(a)
	17. Preliminary relief	Yes 1964(b)	Yes 842-8(b)
	- harm requirement	NP	NP
	- bond is an option	Yes 1964(b)	842-8(b)
	18. Showing for relief		
	- general	NP	NP
	- no special	NP	NP
	19. Scope of equitable relief		
	- divest	Yes 1964(a)	Yes 842-8(a)
	- restrict	Yes 1964(a)	Yes 842-8(a)
	- dissolve	Yes 1964(a)	Yes 842-8(a)
	- reorganize	Yes 1964(a)	Yes 842-5
	- revoke permits	NP	Yes 842-5
	- forfeit charter	NP	Yes 842-5
	20. Scope of legal relief		
	- amount	3x 1964(c)	damages 842-8(c)
	- costs	Yes 1964(c)	Yes 842-8(c)
	- attorney fees	Yes 1964(c)	Yes 842-8(c)
PROPERTY SUBJECT	21. Type of property subject to forfeiture		
	- real property	NP	NP
	- personal property	NP	NP
	- money	NP	NP
	- may substitute other property if forfeited property is not available	NP	NP
PROCEDURE AND PRIORITY	22. Civil Investigation Demand (subpoena &/or interrogatory)	Yes 1968	Yes 842-10
	23. Seizure without process in certain instances	NP	NP
	24. Relation back	NP	NP
	25. Jury trial	NP	NP
	26. Estoppel	Yes 1964(d)	Yes 842-8(d)
	27. Intervention by State	NP	NP
	28. Civil suit not precluded by criminal action	NP	NP
	29. Priority of individual over State to compensation	NP	NP
	30. Fund for invest. & prosect.	NP	NP
	31. Reciprocity of enforcement	NP	NP
	32. Statute of limitations	NP	NP
	33. Construction	Liberal PL 91-452 904	Fair Import 701-104
	34. Severability	NP	NP
	35. Findings & Intent	Yes PL 91-452 Sec. 1	NP

* NP means No Provision in the statute for this item.

**The provisions of this statute apply only to Drug Racketeering.

STATE RICO SURVEY		Pennsylvania	Florida
EFFECTIVE		June 6, 1973	Oct. 1, 1977
AMENDED		June 27, 1978 Dec. 4, 1980	June 23, 1979 1981, 1983, 1984, 1985
CRIMINAL ACTION	1. Proceeding allowed	Yes 18 911	Yes 895
	2. Brought by		
	AG	Yes 911e	NP
	DA	Yes 911e	NP
	3. Court	Common Pleas 911d(1)	
ACTS	4. Prohibited Activities		
	- investment of $ from pattern or debt	Yes 911b(1)	Yes 895.03(1)
	- investment or control through pattern or debt	Yes 911b(2)	Yes 895.03(2)
	- participation through pattern or debt	Yes 911b(3)	Yes 895.03(3)
	- conspiracy to do the above	Yes 911b(4)	Yes 895.03(4)
	5. Pattern	2 rel., 1 after off. date, 911h(4)	2 rel., 1 after off. date. 1 w/in 5 yrs. of prior
	6. Predicate offenses	Yes 911h(1)	Yes 895.02(1)
	7. Person	Yes 911h(2)	NP
	8. Enterprise	Yes 911h(3)	Yes 895.02(3)
	9. State of mind	NP	NP
SANCTIONS	10. Sanctions		
	- imprisonment	Felony 1 911e	Yes 895.01(1)
	- fine	Felony 1 911e	Up to 3x gain or harm 895.04(2
	- forfeiture	NP	NP
	- costs	NP	Yes 895.04(2)
	11. Injunctive relief		
	- restraining order	Yes 911d(1)	NP
	- racketeering lien	NP	Yes 895.07
CIVIL SUIT	12. Proceeding allowed	Yes 911d	Yes 895.05
	13. Brought by		
	- AG	Yes 911e	Yes 895.05(3)
	- DA	Yes 911(3)	Yes 895.05(3)
	- Private Party	NP	Yes 895.05(6)
	14. Court	Courts of Common Pleas Commonwealth Ct 911d(1)	Circuit 895.05(1)
	15. Burden of Proof		
	- Law	NP	NP
	- Equity	NP	NP
	16. Provision for innocent parties	Yes 911diii	Yes 895.05(2)(c)
	17. Preliminary relief	Yes 911d2	Yes 895.05(5)(6)
	- harm requirement	NP	Yes 895.05(6)
	- bond is an option	Yes 911d2	Yes 895.055(5)(6)
	18. Showing for relief		
	- general	NP	Yes 895.05(6)
	- no special	NP	Yes 895.05(6)
	19. Scope of equitable relief		
	- divest	Yes 911d(1)(i)	Yes 895.05(1)(a)
	- restrict	Yes 911d(1)(i)	Yes 895.05(1)(b)
	- dissolve	Yes 911d(1)(ii)	Yes 895.05(1)(c)
	- reorganize	NP	Yes 895.05(1)(c)
	- revoke permits	Yes 911d(1)(ii)	Yes 895.05(1)(d)
	- forfeit charter	Yes 911d(1)(ii)	Yes 895.05(1)(e)
	20. Scope of legal relief		
	- amount	divest interest 911d(1)	3x + punitive 895.05(7)
	- costs	NP	Yes 895.05(7)
	- attorney fees	NP	Yes 895.05(7)
PROPERTY SUBJECT	21. Type of property subject to forfeiture		
	- real property	NP	Yes 895.05(2)(a)
	- personal property	NP	Yes 895.05(2)(a)
	- money	NP	Yes 895.05(2)(a)
	- may substitute other property if forfeited property is not available	NP	NP
PROCEDURE AND PRIORITY	22. Civil Investigation Demand (subpoena &/or interrogatory)	Yes 911f	Yes 895.06
	23. Seizure without process in certain instances	NP	Yes 895.05(3)
	24. Relation back	NP	Yes 895.05(2)b
	25. Jury trial	NP	Yes 895.05(7)a
	26. Estoppel	Yes 911d(3)	Yes 895.05(8)
	27. Intervention by State	NP	Yes 895.05(9)
	28. Civil suit not precluded by criminal action	Yes 911d	Yes 895.05(11)
	29. Priority of individual over State to compensation	NP	Yes 895.05(7)(b)
	30. Fund for invest. & prosect.	NP	NP
	31. Reciprocity of enforcement	NP	NP
	32. Statute of limitations	NP	5 yrs. suspended 895.05(10)
	33. Construction	Strict v. Liberal 1 1928	Strict 775.021
	34. Severability	Generally 1 1925	NP
	35. Findings & Intent	Yes 911a	NP

* NP means No Provision in the statute for this item.

**The provisions of this statute apply only to Drug Racketeering.

STATE RICO SURVEY		Arizona	Rhode Island
EFFECTIVE		Oct. 1, 1978	May 5, 1979
AMENDED		April 27, 1980, 1982, 1983, 1986	July 6, 1987
CRIMINAL ACTION	1. Proceeding allowed	Yes 13-2301	Yes 7-15
	2. Brought by		
	AG	NP	NP
	DA	NP	NP
	3. Court	NP	Superior 7-15-8
ACTS	4. Prohibited Activities		
	- investment of $ from pattern or debt	Yes 2312A	Yes 7-15-2(a)
	- investment or control through pattern or debt	Yes 2312A	Yes 7-15-2(b)
	- participation through pattern or debt	Yes 2312B	Yes 7-15-2(c)
	- conspiracy to do the above	NP	NP
	5. Pattern	NP	NP
	6. Predicate offenses	Yes 2301D(4)	Yes 7-15-1(a)
	7. Person	NP	Yes 7-15-1(b)
	8. Enterprise	Yes 2301D(2)	Yes 7-15-1(c)
	9. State of mind	Knowing 2312C	Knowing 7-15-2
SANCTIONS	10. Sanctions		
	- imprisonment	Class 3 Fel. 2312C	Yes 7-15-3
	- fine	Class 3 fel. 2312C	Yes 7-15-3
	- forfeiture	NP	Yes 7-15-3
	- costs	NP	NP
	11. Injunctive relief		
	- restraining order	Yes 2313	7-15-4(a)
	- racketeering lien	Yes 2313, 2314-02	7-15-3.1(a)
CIVIL SUIT	12. Proceeding allowed	Yes 2314	Yes 7-15-4
	13. Brought by		
	- AG	Yes 2314A	7-15-4(b)
	- DA	Yes 2314 A, K	NP
	- Private Party	Yes 2314A	Yes 7-15-4(c)
	14. Court	Superior 2314	Superior 7-15-4(a)
	15. Burden of Proof		
	- Law	Preponderance 2414I	NP
	- Equity	Preponderance 2314I	NP
	16. Provision for innocent parties	Yes 2314B	Yes 7-15-4(a)
	17. Preliminary relief	Yes 2314C	Yes 7-15-4(b)
	- harm requirement	NP	NP
	- bond is an option	Yes 2314C	Yes 7-15-4(b)
	18. Showing for relief		
	- general	NP	NP
	- no special	NP	NP
	19. Scope of equitable relief		
	- divest	Yes 2314D(1)	Yes 7-15-4(a)
	- restrict	Yes 2314D(2)	Yes 7-15-4(a)
	- dissolve	Yes 2314D(3)	Yes 7-15-4(a)
	- reorganize	Yes 2314D(3)	Yes 7-15-4(a)
	- revoke permits	NP	NP
	- forfeit charter	NP	NP
	20. Scope of legal relief		
	- amount	3x 2314A	3x 7-15-4(c)
	- costs	Yes 2314A	Yes 7-15-4(c)
	- attorney fees	Yes 2314A	Yes 7-15-4(c)
PROPERTY SUBJECT	21. Type of property subject to forfeiture		
	- real property	Yes 2314D(6)(a),(b)	NP
	- personal property	Yes 2314D(6)(c)	NP
	- money	Yes 2314D(6)(c)	NP
	- may substitute other prop. if forfeited prop. not available	NP	NP
PROCEDURE AND PRIORITY	22. Civil Investigation Demand (subpoena &/or interrogatory)	Yes 2315	Yes 7-15-7
	23. Seizure without process in certain instances	NP	NP
	24. Relation back	2314-02I(1),(2)	NP
	25. Jury trial	NP	NP
	26. Estoppel	Yes 2314F	Yes 7-15-4(d)
	27. Intervention by State	Yes, but not in action by D.A. 2314K	NP
	28. Civil suit not precluded by criminal action	Yes 2314H	Yes 7-15-4(e)
	29. Priority of individual over State to compensation	NP	Yes 7-15-4.1(a)
	30. Fund for invest. & prosect.	NP	7-15-4.1
	31. Reciprocity of enforcement	NP	NP
	32. Statute of limitations	Yes 2314G	NP
	33. Construction	Fair Meaning 13-104	Liberal 7-15-10
	34. Severability	NP	Yes 7-15-11
	35. Findings & Intent	NP	NP

* NP means No Provision in the statute for this item.

**The provisions of this statute apply only to Drug Racketeering.

STATE RICO SURVEY		New Mexico	Georgia
EFFECTIVE		Feb. 28, 1980	July 1, 1980
AMENDED		July 1, 1980	April 16, 1982, 1983, 1985, 1989
CRIMINAL ACTION	1. Proceeding allowed	Yes 30-42	Yes 16-14-1
	2. Brought by		
	AG	Yes 30-42-5	NP
	DA	Yes 30-42-5	NP
	3. Court	District 30-42-4F	NP
ACTS	4. Prohibited Activities		
	- investment of $ from pattern or debt	Yes 30-42-4A	Yes 16-14-4(a)
	- investment or control through pattern or debt	Yes 30-42-4B	Yes 16-14-4(a)
	- participation through pattern or debt	Yes 30-42-4C	Yes 16-14-4(b)
	- conspiracy to do the above	Yes 30-42-4D	Yes 16-14-4(c)
	5. Pattern	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 30-42-3D	2 rel., 1 after eff. date, 1 w/in 4 yrs. of prior imprisonment 16-14-3(b)
	6. Predicate offenses	Yes 30-42-3A	Yes 16-14-3(9)(a)(b)
	7. Person	Yes 30-42-3B	NP
	8. Enterprise	Yes 30-42-3C	Yes 16-14-3(b)
	9. State of mind	NP	NP
SANCTIONS	10. Sanctions		
	- imprisonment	Fel. 2 deg. or 3 deg. 30-42-4A-D	Yes 16-14-5(a)
	- fine	NP	Up to $25,000 or 3x gain 16-14-5(b)
	- forfeiture	Yes 30-42-4E	Yes via Civil Proc.
	- costs	NP	NP
	11. Injunctive relief		
	- restraining order	Yes 30-42-4F	NP
	- racketeering lien	Yes 30-42-4F	NP
CIVIL SUIT	12. Proceeding allowed	Yes 30-42-6A	Yes 16-14-6
	13. Brought by		
	- AG	Yes 30-42-6B	Yes 16-14-6(b)
	- DA	Yes 30-42-6B	Yes 16-14-6(b)
	- Private Party	Yes 30-42-6A	Yes 16-14-6(b)
	14. Court	District 30-42-6A	Superior 16-14-6(a)
	15. Burden of Proof		
	- Law	NP	NP
	- Equity	NP	NP
	16. Provision for innocent parties	Yes 30-42-6C	Yes 16-14-6(d)
	17. Preliminary relief	Yes 30-42-6C	Yes 16-14-6(b)
	- harm requirement	NP	Yes 16-14-6(b)
	- bond is an option	Yes 30-42-6C	Yes 16-14-6(b)
	18. Showing for relief		
	- general	NP	Yes 16-14-6(b)
	- no special	NP	Yes 16-14-6(b)
	19. Scope of equitable relief		
	- divest	Yes 30-42-6D1	Yes 16-14-6(a)(1)
	- restrict	Yes 30-42-6D2	Yes 16-14-6(a)(2)
	- dissolve	Yes 30-42-6D3	Yes 16-14-6(a)(3)
	- reorganize	Yes 30-42-6D3	Yes 16-14-6(a)(3)
	- revoke permits	NP	Yes 16-14-6(a)(4)
	- forfeit charter	NP	Yes 16-14-6(a)(5)
	20. Scope of legal relief		
	- amount	3x 30-42-6A	3x + punitive 16-14-6(c)
	- costs	Yes 30-42-6A	
	- attorney fees	Yes 30-42-6A	Yes 16-14-6(c)
PROPERTY SUBJECT	21. Type of property subject to forfeiture		
	- real property	NP	Yes 16-14-7(a)
	- personal property	NP	Yes 16-14-7(a)
	- money	NP	Yes 16-14-7(a)
	- may substitute other property if forfeited property is not available	NP	NP
PROCEDURE AND PRIORITY	22. Civil Investigation Demand (subpoena &/or interrogatory)	NP	NP
	23. Seizure without process in certain instances	NP	Yes 16-14-7(f)
	24. Relation back	NP	Yes 16-14-8
	25. Jury trial	NP	Yes 16-14(c)
	26. Estoppel	NP	Yes 16-14-6(e)
	27. Intervention by State	NP	NP
	28. Civil suit not precluded by criminal action	NP	Yes 16-14-9
	29. Priority of individual over State to compensation	NP	Yes 16-14-6(d)
	30. Fund for invest. & prosect.	NP	NP
	31. Reciprocity of enforcement	NP	Yes 16-14-10
	32. Statute of limitations	NP	5 yrs suspended 16-14-8
	33. Construction	Approved Usage 12-2-2	Fair Warning construed to further intent 16-14-2(b)
	34. Severability	NP	NP
	35. Findings & Intent	Yes 30-42-2	Yes 16-14-2

* NP means No Provision in the statute for this item.
**The provisions of this statute apply only to Drug Racketeering.

STATE RICO SURVEY		Indiana	New Jersey
EFFECTIVE		1980, 1984, 1985	July 13, 1981
AMENDED			April 22, 1987
CRIMINAL ACTION	1. Proceeding allowed	Yes 35-45-6-1	Yes 2C:-41-1
	2. Brought by		
	AG	NP	Yes 41-3(c)
	DA	NP	Pros. Atty. 41-1(g) when authorized
	3. Court	NP	NP
ACTS	4. Prohibited Activities		
	- investment of $ from pattern or debt	Yes -6-2(a)(1)	Yes 41-2(a)
	- investment or control through pattern or debt	Yes -6-2(a)(2)	Yes 41-2(b)
	- participation through pattern or debt	Yes -6-2(a)(3)	Yes 41-2(c)
	- conspiracy to do the above	NP	Yes 41-2(d)
	5. Pattern	2 rel., 1 after eff. dt, 1 w/in 5 yrs. of prior -6-1.014	2 rel., 1 after eff. dt, 1 w/in 10 yrs. of prior excl. imprisonment 41-1(d),(2)
	6. Predicate offenses	Yes -6-1.016	Yes 41-1(a)
	7. Person	NP	Yes 41-1(b)
	8. Enterprise	Yes -6-1(b)	Yes 41-1(c)
	9. State of mind	Knowledge or Intent -6-2	NP
SANCTIONS	10. Sanctions		
	- imprisonment	Class C Felony -6-2	1st w/gun, 2nd w/out 41-3-(a)
	- fine	Class C Felony -6-2	1w/gun 41-3-(a) 2nd w/out gun 41-3(a)
	- forfeiture	NP	Yes 41-3(b)
	- costs	NP	NP
	11. Injunctive relief		
	- restraining order	NP	NP
	- racketeering lien	NP	NP
CIVIL SUIT	12. Proceeding allowed	Yes 34-4-30.5	Yes 41-4
	13. Brought by		
	- AG	Yes -30.5-5(e)	Yes 41-4(b)
	- DA	Pros. Atty -30.5-2	NP
	- Private Party	Yes -30.5-5	Yes 41-4(c)
	14. Court	Circuit or Superior -30.5-2	Superior 41-4(a)
	15. Burden of Proof		
	- Law	Preponder. -30.5-2	NP
	- Equity	Preponder. -30.5-2	NP
	16. Provision for innocent parties	Yes -30.5-2(6)	Yes 41-4(a)
	17. Preliminary relief	Yes -30.5-3(a)	Yes 41-4(b)
	- harm requirement	Yes -30.5-3(a)	NP
	- bond is an option	Yes -30.5-3(a)	Yes 41-4(b)
	18. Showing for relief		
	- general	Yes -30.5-3(a)	NP
	- no special	Yes -30.5-3(a)	NP
	19. Scope of equitable relief		
	- divest	Yes -30.5-2(1)	Yes 41-4(a)(1)
	- restrict	Yes -30.5-2(2)	Yes 41-4(a)(2)
	- dissolve	Yes -30.5-2(3)	Yes 41-4(a)(3)
	- reorganize	Yes -30.5-2(3)	Yes 41-4(a)(3)
	- revoke permits	Yes -30.5-2(4)	Yes 41-4(a)(5)
	- forfeit charter	Yes -30.5-2(5)	Yes 41-4(a)(4)
	20. Scope of legal relief		
	- amount	3x + punitive -30.5-5(b)(1),(4)	3x 41-4(c) Yes 41-4(c)
	- costs	Yes -30.5-5(b)(2)	Yes 41-4(c)
	- attorney fees	Yes -30.5-5(b)(3)	Yes 41-4(c)
PROPERTY SUBJECT	21. Type of property subject to forfeiture		
	- real property	Yes -30.5-3	Yes 41-4(a)(2)
	- personal property	Yes -30.5-3	Yes 41-4(b)(1)
	- money	NP	Yes 41-4(b)(1)
	- may substitute other prop. if forfeited prop. not available	NP	NP
PROCEDURE AND PRIORITY	22. Civil Investigation Demand (subpoena &/or interrogatory)	NP	Yes 41-5
	23. Seizure without process in certain instances	Yes -30.5-4	NP
	24. Relation back	NP	NP
	25. Jury trial	Yes -30.5-5(c)	NP
	26. Estoppel	Yes -30.5-6	Yes 41-4(d)
	27. Intervention by State	NP	NP
	28. Civil suit not precluded by criminal action	NP	Yes 41-6.11
	29. Priority of individual over State to compensation	Yes -30.5-5(d)	NP
	30. Fund for invest. & prosect.	NP	Yes 41-3(b)
	31. Reciprocity of enforcement	NP	NP
	32. Statute of limitations	NP	NP
	33. Construction	Plain, ordinary usual sense 1-1-4-1	Liberal 41-6
	34. Severability	NP	Yes 41-6.2
	35. Findings & Intent	NP	Yes 41-1.1

* NP means No Provision in the statute for this item.

**The provisions of this statute apply only to Drug Racketeering.

STATE RICO SURVEY		Utah	Colorado
EFFECTIVE		July 1, 1981	July 1, 1981
AMENDED		1985, 1987, 1989	1981, 1982, 1983, 1984, 1987, 1988
CRIMINAL ACTION	1. Proceeding allowed	Yes 76-10-1601	Yes 18-17-101
	2. Brought by		
	AG	Yes 1604	105(6)
	DA	Yes 1604	NP
	3. Court	NP	105(6)
ACTS	4. Prohibited Activities		
	- investment of $ from pattern or debt	Yes 1603(1)	Yes -104(1)(a)
	- investment or control through pattern or debt	Yes 1603(2)	Yes -104(2)
	- participation through pattern or debt	Yes 1603(3)	Yes -104(3)
	- conspiracy to do the above	Yes 1604(4)	Yes -104(4)
	5. Pattern	3 rel., 1 after eff. dt, 1 w/in 5 yrs. of prior 1602(4)	2 rel., 1 after eff. dt, 1 w/in 10 yrs. of of prior excl. imprisonment -103(3)
	6. Predicate offenses	Yes 1602(1)	Yes -103(5)
	7. Person	Yes 1602(4)	Yes -103(4)
	8. Enterprise	Yes 1602(2)	Yes -103(2)
	9. State of mind	NP	NP
SANCTIONS	10. Sanctions		
	- imprisonment	2d deg. Fel 1603(5)	Class 2 Fel. -105(1)
	- fine	2d deg. Fel 1603(5)	Up to $25,000, -105(1)(a) up to 3x gain or harm -105(2)
	- forfeiture	Yes 1603(5)	Yes -105(1)(b)
	- costs	1603(3)	Yes with 3x fine on forfeiture -105(2) -105(6)(d)(II)
	11. Injunctive relief		
	- restraining order	Yes 1603(8)	Yes -105(5)
	- racketeering lien	NP	NP
CIVIL SUIT	12. Proceeding allowed	Yes 1605(1)	Yes -106(5)
	13. Brought by		
	- AG	Yes 1605(6)	Yes -106(5)
	- DA	Yes 1605(6)	Yes -106(5)
	- Private Party	Yes 1605(1)	Yes -106(6)
	14. Court	District 1605(1)	District -106(1)
	15. Burden of Proof		
	- Law	Clear & convincing 1605(5)	Yes -106(11)
	- Equity	Prepondar. 1605(2)	NP
	16. Provision for innocent parties	Yes 1605(8)	Yes -106(1)
	17. Preliminary relief	Yes 1605(3)	Yes -106(6)
	- harm requirement	NP	Yes -106(6)
	- bond is an option	Yes 1605(10)(b)(iii)	Yes -106(6)
	18. Showing for relief		
	- general	NP	Yes -106(6)
	- no special	NP	Yes -106(6)
	19. Scope of equitable relief		
	- divest	Yes 1605(10)(c)(i)	Yes -106(1)(a)
	- restrict	Yes 1605(10)(c)(ii)	Yes -106(1)(b)
	- dissolve	Yes 1605(10)(c)(iii)	Yes -106(1)(c)
	- reorganize	Yes 1605(10)(c)(iii)	Yes -106(1)(c)
	- revoke permits	NP	Yes -106(1)(d)
	- forfeit charter	NP	Yes -106(1)(e)
	20. Scope of legal relief		
	- amount	2x +punitive 1605(1)	3x -106(7)
	- costs	Yes 1605(2)	Yes -106(7)
	- attorney fees	Yes 1605(2)	Yes -106(7)
PROPERTY SUBJECT	21. Type of property subject to forfeiture		
	- real property	repealed	Yes -106(2)
	- personal property	repealed	Yes -106(2)
	- money	NP	Yes -106(2)
	- may substitute other prop. if forfeited prop. not available	repealed	NP
PROCEDURE AND PRIORITY	22. Civil Investigation Demand (subpoena &/or interrogatory)	NP	Yes -107
	23. Seizure without process in certain instances	NP	Yes -106(3)
	24. Relation back	NP	NP
	25. Jury trial	NP	Yes -106(7)(a)
	26. Estoppel	Yes 1607	Yes -106(8)
	27. Intervention by State	NP	NP
	28. Civil suit not precluded by criminal action	NP	Yes -106(9)
	29. Priority of individual over State to compensation	NP	Yes -106(7)(b)
	30. Fund for invest. & prosect.	NP	NP
	31. Reciprocity of enforcement	NP	NP
	32. Statute of limitations	NP	NP
	33. Construction	Fair Import 76-1-106	Liberal 108
	34. Severability	Yes 1608	Yes -109
	35. Findings & Intent	NP	Yes -101

* NP means No Provision in the statute for this item.

**The provisions of this statute apply only to Drug Racketeering.

STATE RICO SURVEY		Idaho	Oregon
EFFECTIVE		1981	1981
AMENDED		1989	1983, 1985, 1987
CRIMINAL ACTION	1. Proceeding allowed	Yes 18-7801	Yes 166.715
	2. Brought by		
	AG	NP	NP
	DA	NP	NP
	3. Court	NP	NP
ACTS	4. Prohibited Activities		
	- investment of $ from pattern or debt	Yes 7804(a)	Yes .720(1)
	- investment or control through pattern or debt	Yes 7804(b)	Yes .720(2)
	- participation through pattern or debt	Yes 7804(c)	Yes .720(3)
	- conspiracy to do the above	Yes 7804(d)	Yes .720(4)
	5. Pattern	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 7803(d)	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior .715(4)
	6. Predicate offenses	Yes 7803(a)	Yes .715(6)
	7. Person	Yes 7803(b)	Yes .715(5)
	8. Enterprise	Yes 7803(c)	Yes .715(2)
	9. State of mind	NP	NP
SANCTIONS	10. Sanctions		
	- imprisonment	Up to 14 yrs. 7804(e)	Class A Fel. .720(5)(a)
	- fine	Up to $25,000 .7804(e)	Yes or up .720(5)(a) to 3x gain or harm .720(5)(b)
	- forfeiture	Yes 7804(f)	Yes .725
	- costs	NP	Yes .720(5)(b)
	11. Injunctive relief		
	- restraining order	Yes 7804(g)	Yes .725
	- racketeering lien	NP	NP
CIVIL SUIT	12. Proceeding allowed	Yes 7805	Yes .725
	13. Brought by		
	- AG	Yes 7805(b)	Yes .725(5)
	- DA	Yes 7805(b)	Yes .725(5)
	- Private Party	Yes 7805(a)	Yes .725(8)
	14. Court	District 7805(c)	Circuit .725(1)
	15. Burden of Proof		
	- Law	NP	NP
	- Equity	NP	NP
	16. Provision for innocent parties	Yes 7805(c)	Yes .725(1),(2)
	17. Preliminary relief	Yes 7805(c)	Yes .725(5)
	- harm requirement	NP	NP for gov't .725(5)
	- bond is an option	Yes 7805(c)	Yes .725(5),(6)
	18. Showing for relief		
	- general	NP	NP
	- no special	NP	Yes .725(6)
	19. Scope of equitable relief		
	- divest	Yes 7805(d)(1)	Yes .725(1)(a)
	- restrict	Yes 7805(d)(2)	Yes .725(1)(b)
	- dissolve	Yes 7805(d)(3)	Yes .725(1)(c)
	- reorganize	Yes 7805(d)(3)	Yes .725(1)(c)
	- revoke permits	Yes 7805(d)(3)	Yes .725(1)(d)
	- forfeit charter	Yes 7805(d)(6)	Yes .725(1)(e)
	20. Scope of legal relief		
	- amount	3x 7805(a)	3x + punitive .725(7)(a)
	- costs	Yes 7805(a)	Yes .725(7)(a)
	- attorney fees	Yes 7805(a)	Yes .725(7)(a)
PROPERTY SUBJECT	21. Type of property subject to forfeiture		
	- real property	NP	Yes .725(2)
	- personal property	NP	Yes .725(2)
	- money	NP	Yes .725(2)
	- may substitute other property if forfeited property is not available	NP	NP
PROCEDURE AND PRIORITY	22. Civil Investigation Demand (subpoena &/or interrogatory)	NP	Yes .730
	23. Seizure without process in certain instances	NP	Yes .725(32)
	24. Relation back	NP	NP
	25. Jury trial	NP	Yes .725(7)(b)
	26. Estoppel	NP	Yes .725(9)
	27. Intervention by State	NP	Yes .725(10)
	28. Civil suit not precluded by criminal action	NP	Yes .725(12)
	29. Priority of individual over State to compensation	NP	Yes .725(7)(c)
	30. Fund for invest. & prosect.	NP	NP
	31. Reciprocity of enforcement	NP	NP
	32. Statute of limitations	NP	5 yrs. suspended .725(11)
	33. Construction	Liberal 73-102(1)	Liberal .735(2)
	34. Severability	NP	NP
	35. Findings & Intent	Yes 7802	NP

* NP means No Provision in the statute for this item.

**The provisions of this statute apply only to Drug Racketeering.

STATE RICO SURVEY		Wisconsin	Illinois
EFFECTIVE		April 27, 1982	August 18, 1982
AMENDED		1982	1986, June 1, 1987
CRIMINAL ACTION	1. Proceeding allowed	Yes 946.88	Yes 56 1/2 1651
	2. Brought by		
	AG	Yes 946.87(3)	Yes 1655 5(d)
	DA	Yes 946.87(3)	Yes 1655 5(d)
	3. Court	NP	Cir. Ct. 1656 6(a)
ACTS	4. Prohibited Activities		
	- investment of $ from pattern or debt	Yes 946.83(1)	Yes 1654 4(b)
	- investment or control through pattern or debt	Yes 946.83(2)	Yes 1654 4(c)
	- participation through pattern or debt	Yes 946.83(3)	Yes 1654 4(d)
	- conspiracy to do the above	NP	Knowing 1654 4
	5. Pattern	3 vol., 1 after eff. date, last w/in 7 yrs. of prior. Mult. acts at same time & place count	2 vol., 1 after eff. dt, 1 w/in 5 yrs of prior. At least 1 must be Class X, 1 or 2 Felony 1653 3(b)
	6. Predicate offenses	Yes 946.82(4)	Yes 1653 3(a)(1), (2)
	7. Person	NP	Yes 1653 3(c)
	8. Enterprise	Yes 946.82(2)	Yes 1653 3(d)
	9. State of mind	NP	NP
SANCTIONS	10. Sanctions		
	- imprisonment	Class C fel. 946.84(1)	Class X Fel 1655 5(a)
	- fine	Up to 2x gain or loss 946.84(2)	Up to $250,000, 1655 5(a)(2)
	- forfeiture	NP	Yes 1655 5(a)(3)
	- costs	Yes 946.84(2) greater penalties for "Continuing Criminal Enterprise" 946.85	NP
	11. Injunctive relief		
	- restraining order	NP	Yes 1655 5(c)
	- racketeering lien	NP	NP
CIVIL SUIT	12. Proceeding allowed	Yes 946.86	Yes 1656 6(a)
	13. Brought by		
	- AG	Yes 946.86(3)	Yes 1656 6(b)
	- DA	Yes 946.86(3)	Yes 1656 6(b)
	- Private Party	Yes 946.86(4)	Yes 1656 6(c)
	14. Court	Circuit 946.86	Circuit 1657 7
	15. Burden of Proof		
	- Law	Reasonable Certainty 946.86(3)	NP
	- Equity	Reas. Cert. 946.86(3)	NP
	16. Provision for innocent parties	Yes 946.86(1)	Yes 1656 6(a)
	17. Preliminary relief	Yes 946.86(3)	Yes 1656 6(b)
	- harm requirement	NP	NP
	- bond is an option	Yes 946.86(3)	Yes 1656 6(b)
	18. Showing for relief		
	- general	NP	NP
	- no special	NP	NP
	19. Scope of equitable relief		
	- divest	Yes 946.86(1)(a)	Yes 1656 6(a)
	- restrict	Yes 946.86(1)(b)	Yes 1656 6(a)
	- dissolve	Yes 946.86(1)(c)	Yes 1656 6(a)
	- reorganize	Yes 946.86(1)(c)	Yes 1656 6(a)
	- revoke permits	Yes 946.86(1)(d)	NP
	- forfeit charter	Yes 946.86(1)(e)	NP
	20. Scope of legal relief		
	- amount	3x + punitive 946.86(4)	3x 1656 6(c)
	- costs	Yes 946.86(4)	Yes 1656 6(c)
	- attorney fees	Yes 946.86(4)	Yes 1656 6(c)
PROPERTY SUBJECT	21. Type of property subject to forfeiture		
	- real property	Yes 946.86(2)(a)	Yes 1655 5(a)(3)
	- personal property	Yes 946.86(2)(a)	Yes 1655 5(a)(3)
	- money	Yes 946.86(2)(a)	Amb. 1655 5(a)(3)
	- may substitute other property if forfeited property is not available	NP	NP
PROCEDURE AND PRIORITY	22. Civil Investigation Demand (subpoena &/or interrogatory)	NP	NP
	23. Seizure without process in certain instances	NP	NP
	24. Relation back	NP	NP
	25. Jury trial	Yes 946.86(4)	NP
	26. Estoppel	Yes 946.86(6)	Yes 1656 6(d)
	27. Intervention by State	NP	NP
	28. Civil suit not precluded by criminal action	Yes 946.87(2)	NP
	29. Priority of individual over State to compensation	Yes 946.86(2)(b)	NP
	30. Fund for invest. & prosecut.	NP	Yes 1655 5(g)
	31. Reciprocity of enforcement	NP	NP
	32. Statute of limitations	6 yrs. sus. 946.87(1)	NP
	33. Construction	Reasonable Intendment	Liberal 1658 8
	34. Severability	NP	Yes 1659 9
	35. Findings & Intent	Yes 946.81	Yes 1652 2

* NP means No Provision in the statute for this item.
**The provisions of this statute apply only to Drug Racketeering.

STATE RICO SURVEY		California	Connecticut
EFFECTIVE		January 1, 1983	
AMENDED		1984, 1986, 1987, 1988	1984
CRIMINAL ACTION	1. Proceeding allowed	Yes Penal 186	Yes 53-393
	2. Brought by		
	AG	Yes 186.2(a)	Yes 53-394(f)
	DA	Yes 186.2(a)	Yes 53-394(f)
	3. Court	Superior 186.3(a)(1)	Superior 53-398(a)
ACTS	4. Prohibited Activities		
	- investment of $ from pattern or debt	NP	Yes 53-395(a)
	- investment or control through pattern or debt	NP	Yes 53-395(b)
	- participation through pattern or debt	NP	Yes 53-395(c)
	- conspiracy to do the above	NP	NP
	5. Pattern	2 rel., 1 after eff. dt, 1 w/in 10 yrs. of prior comm. Imprisonment & acts acquitted w/org. crime limitations 186.2(b)	53-394(e) rel. inc., 1 after Oct. 1, 1982, last
	6. Predicate offenses	Yes 186.2(a)	Yes 53-394(a)
	7. Person	NP	Yes 53-394(d)
	8. Enterprise	NP	Yes 53-394(c)
	9. State of mind	NP	Knowingly for 53-395(c) part or conduct enterprise through racketeering act
SANCTIONS	10. Sanctions		
	- imprisonment	NP	53-397(a) 1-20 yrs
	- fine	NP	53-397(a) $25,000
	- forfeiture	Yes 186.3, 186.7(a)	Yes 53-397(a)
	- costs	NP	NP
	11. Injunctive relief		
	- restraining order	Yes 186.6(a)	Yes 53-397(b)(4)(C)
	- racketeering lien	NP	53-398(a)
CIVIL SUIT	12. Proceeding allowed	NP	Yes 53-398(a)
	13. Brought by		
	- AG	NP	NP
	- DA	NP	NP
	- Private Party	NP	NP
	14. Court	NP	NP
	15. Burden of Proof		
	- Law	NP	NP
	- Equity	NP	NP
	16. Provision for innocent parties	NP	53-397(b)(3),(4)
	17. Preliminary relief	NP	NP
	- harm requirement	NP	NP
	- bond is an option	NP	NP
	18. Showing for relief		
	- general	NP	NP
	- no special	NP	NP
	19. Scope of equitable relief		
	- divest	NP	NP
	- restrict	NP	NP
	- dissolve	NP	NP
	- reorganize	NP	NP
	- revoke permits	NP	NP
	- forfeit charter	NP	NP
	20. Scope of legal relief		
	- amount	NP	NP
	- costs	NP	NP
	- attorney fees	NP	NP
PROPERTY SUBJECT	21. Type of property subject to forfeiture		
	- real property	Yes 186.3(b), (c)	Yes 53-397(a)
	- personal property	Yes 186.3(b), (c)	Yes 53-397(a)
	- money	NP	Yes 53-397(a)
	- may substitute other prop. if forfeited prop. not available	NP	NP (53-397(b)(3) nullifies conveyance to avoid forfeit)
PROCEDURE AND PRIORITY	22. Civil Investigation Demand (subpoena &/or interrogatory)	NP	NP
	23. Seizure without process in certain instances	NP	NP
	24. Relation back	NP	Yes 53-402
	25. Jury trial	NP	NP
	26. Estoppel	NP	NP
	27. Intervention by State	NP	NP
	28. Civil suit not precluded by criminal action	NP	53-402
	29. Priority of individual over State to compensation	NP	NP
	30. Fund for invest. & prosect.	NP	NP
	31. Reciprocity of enforcement	NP	Yes 54-403; 5 yrs after activity terminates
	32. Statute of limitations	NP	NP
	33. Construction	NP	NP
	34. Severability	NP	Yes 53-403
	35. Findings & Intent	Yes 186.1	

* NP means No Provision in the statute for this item.

**The provisions of this statute apply only to Drug Racketeering.

STATE RICO SURVEY		North Dakota	Nevada
EFFECTIVE		1983	July 1, 1983
AMENDED		1987	Effective May 30, 1983 Effective October 1, 1989
CRIMINAL ACTION	1. Proceeding allowed	Yes 12.1-06.1	Yes 207.350
	2. Brought by		
	AG	NP	NP
	DA	NP	207.430 Pros. Atty.
	3. Court	NP	NP
ACTS	4. Prohibited Activities		
	- investment of $ from pattern or debt	NP	Yes 207.400(a)
	- investment or control through pattern or debt	Yes -06.1-03(1)	Yes 207.400(b)
	- participation through pattern or debt	Yes -06.1-03(2)	Yes 207.400(c)
	- conspiracy to do the above	NP	Yes 207.400(h)
	5. Pattern	-06.1-01(2)(d) 2 rel., 1 after 7/8/87, last w/in 10 yrs of prior	207.390 2 rel. including, 1 after eff. date, 1 w/in 5 yrs. of prior
	6. Predicate offenses	Yes -06.1-03(2)(c)	Yes 207.360
	7. Person	NP	NP
	8. Enterprise	NP	Yes 207.380
	9. State of mind	Knowing -06.1-04	207.400(d) intent, (e) know, (f) intent, (g) intent
SANCTIONS	10. Sanctions		
	- imprisonment	Class B Fel -06.1-07(3)	207.400 5-20 yrs
	- fine	Class B Fel -06.1-03(3)	207.400 more than $25,000 or 207.410 3x gain or loss
	- forfeiture	Yes -06.1-03(4)	Yes 207.420(1), 430(1)
	- costs	Yes -06.1-03(4)	Yes 207.410
	11. Injunctive relief		
	- restraining order	Yes -06.1-03(4)	Yes 207.430, 440, 450(2)
	- racketeering lien	Yes -06.1-03(4)	NP
CIVIL SUIT	12. Proceeding allowed	Yes -06.1-05(1)	Yes 207.470
	13. Brought by		
	- AG	Yes -06.1-05(1)	Yes 207.490(4)
	- DA	NP	Yes 207.490(4)
	- Private Party	Yes -06.1-05(1)	Yes 207.470(1)
	14. Court	District -06.1-05(2)	District 207.470(3)
	15. Burden of Proof		
	- Law	Preponder. -06.1-05	NP
	- Equity	Preponder. -06.1-05	NP
	16. Provision for innocent parties	Yes -06.1-05(2)	Yes 207.380(2)
	17. Preliminary relief	Yes -06.1-05(3)	Yes 207.490(3)
	- harm requirement	NP	NP
	- bond is an option	Yes -06.1-05(3)	Yes 207.490(3)
	18. Showing for relief		
	- general	NP	NP
	- no special	NP	NP
	19. Scope of equitable relief		
	- divest	Yes -06.1-05(4)(a)	NP
	- restrict	Yes -06.1-05(4)(b)	NP
	- dissolve	Yes -06.1-05(4)(c)	NP
	- reorganize	Yes -06.1-05(4)(e)	NP
	- revoke permits	NP	NP
	- forfeit charter	NP	NP
	20. Scope of legal relief		
	- amount	3x -06.1-05(1)	207.470(1) 3x actual
	- costs	Yes -06.1-05(1)	Yes 207.470(1)
	- attorney fees	Yes -06.1-05(1)	Yes 207.470(1)
PROPERTY SUBJECT	21. Type of property subject to forfeiture		
	- real property	Yes -06.1-05(4)(f)(1)	Yes 207.460(a)
	- personal property	Yes -06.1-05(4)(f)(2)	Yes 207.460(a)
	- money	Yes -06.1-05(4)(f)(3)	Yes 207.460(a)
	- may substitute other property if forfeited property is not available	Yes -06.1-05(4)(g)	Criminally 207.420(3)
PROCEDURE AND PRIORITY	22. Civil Investigation Demand (subpoena &/or interrogatory)	Yes -06.1-06	NP
	23. Seizure without process in certain instances	NP	Yes 207.490(1)
	24. Relation back	Yes -06.1-06	NP
	25. Jury trial	NP	Yes 207.470(1)
	26. Estoppel	Yes -06.1-05(6)	Yes 207.470(2)
	27. Intervention by State	Yes -06.1-05(10)	Yes 207.490(4)
	28. Civil suit not precluded by criminal action	Yes -06.1-05(13)	Yes 207.470(4)
	29. Priority of individual over State to compensation	NP	Yes 207.470(1)
	30. Fund for invest. & prosect.	NP	NP
	31. Reciprocity of enforcement	NP	NP
	32. Statute of limitations	7 yrs. -06.105(7)	207.520 5 yrs suspended
	33. Construction	Liberal 1-02-01	Fair Import 193.030
	34. Severability	NP	NP
	35. Findings & Intent	NP	NP

* NP means No Provision in the statute for this item.

**The provisions of this statute apply only to Drug Racketeering.

STATE RICO SURVEY		Louisiana	Mississippi
EFFECTIVE		July 22, 1983	July 1, 1984
AMENDED		1989	1985, 1986
CRIMINAL ACTION	1. Proceeding allowed	Yes 15:1351	Yes 97-43-3
	2. Brought by		
	AG	NP	NP
	DA	NP	NP
	3. Court	NP	Circuit 97-43-9
ACTS	4. Prohibited Activities		
	- investment of $ from pattern or debt	Yes 1353(A)	Yes 97-43-5(1)
	- investment or control through pattern or debt	Yes 1353(B)	Yes 97-43-5(2)
	- participation through pattern or debt	Yes 1353(C)	Yes 97-43-5(3)
	- conspiracy to do the above	Yes 1353(D)	Yes 97-43-5(4)
	5. Pattern	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 1352(C)	2 rel., 1 after eff. date, 1 w/in 5 yrs. of prior 3(d)
	6. Predicate offenses	Yes 1352(A)	Yes 97-43-3(a)
	7. Person	NP	Yes (general) 1-3-39
	8. Enterprise	Yes 1352(B)	Yes 97-43-3(c)
	9. State of mind	Knowing 1353(A)	Intent 97-43-5(1)
SANCTIONS	10. Sanctions		
	- imprisonment	Up to 50 yrs. 1354(A)	Up to 20 yrs 97-43-7(1)
	- fine	Up to $1,000,000 or 3x loss 1354(B) or gain 1354(B)	Up to $25,000 97-43-7(1) or 3x loss or gain 97-43-7(2)
	- forfeiture	Yes 1356(A)(1)	Yes 97-43-(2)
	- costs	Yes 1354(B)	Yes 97-43-7(2)
	11. Injunctive relief		
	- restraining order	Yes 1356(D)	NP
	- racketeering lien	NP	NP
CIVIL SUIT	12. Proceeding allowed	Yes 1356	Yes 97-43-9
	13. Brought by		
	- AG	NP	Yes 97-43-(4)
	- DA	Yes 1356(D)	Yes 97-43-(4)
	- Private Party	Yes 1356(E)	Yes 97-43-(5)
	14. Court	District 1356(D)	Circuit 97-43-(1)
	15. Burden of Proof		
	- Law	NP	NP
	- Equity	NP	NP
	16. Provision for innocent parties	Yes 1356(A)(2)	Yes 97-43-(1)
	17. Preliminary relief		Yes 97-43-9(4)
	- harm requirement	NP	NP
	- bond is an option	Yes 1356(D)	Yes 97-43-9(4)
	18. Showing for relief		
	- general	NP	Yes 97-43-9(3)
	- no special	NP	Yes 97-43-9(3)
	19. Scope of equitable relief		
	- divest	NP	Yes 97-43-(1)(a)
	- restrict	NP	Yes 97-43-(1)(b)
	- dissolve	NP	Yes 97-43-(1)(c)
	- reorganize	NP	Yes 97-43-(1)(c)
	- revoke permits	NP	Yes 97-43-(1)(d)
	- forfeit charter	NP	Yes 97-43-(1)(e)
	20. Scope of legal relief		
	- amount	the larger of 3x or $10,000, 1356(E)	3x + punitive 97-43-9(6)
	- costs	Yes 1356(E)	Yes 97-43-9(6)
	- attorney fees	Yes 1356(E)	Yes 97-43-9(6)
PROPERTY SUBJECT	21. Type of property subject to forfeiture		
	- real property	Yes 1356(A)(1)	Yes 97-43-9(2)
	- personal property	Yes 1356(A)(1)	Yes 97-43-9(2)
	- money	Yes 1356(A)(1)	Yes 97-43-9(2)
	- may substitute other property if forfeited property is not available	NP	NP
PROCEDURE AND PRIORITY	22. Civil Investigation Demand (subpoena &/or interrogatory)	NP	NP
	23. Seizure without process in certain instances	Yes 1356(B)	Yes 97-43-9(3)
	24. Relation back	NP	NP
	25. Jury trial	NP	Yes 97-43-9(6)(a)
	26. Estoppel	Yes 1356(F)	NP
	27. Intervention by State	Yes 1356(G)	Yes 97-43-9(7)
	28. Civil suit not precluded by criminal action	Yes 1356(I)	Yes 97-43-9(9)
	29. Priority of individual over State to compensation	Yes 1356(A)(1)	Yes 97-43-9(6)(b)
	30. Fund for invest. & prosecut.	Yes 1356(A)(3)	NP
	31. Reciprocity of enforcement	NP	NP
	32. Statute of limitations	5 yrs. suc. 1356(H)	5 yrs. 97-43-9(8)
	33. Construction	Fair Import 14:3	Common Meaning 1-3-65
	34. Severability	NP	Yes (general) 1-3-77
	35. Findings & Intent	NP	NP

* NP means No Provision in the statute for this item.

**The provisions of this statute apply only to Drug Racketeering.

STATE RICO SURVEY		Washington	Ohio
EFFECTIVE		January 1, 1985	January 1, 1986
AMENDED		1985, 1986	1986, 1988
CRIMINAL ACTION	1. Proceeding allowed	Yes .100(1)(b)	Yes 2923.32(B)(1)
	2. Brought by		
	AG	Yes .100(1)(b)	NP
	DA	Yes .100(1)(b)	NP
	3. Court	Superior .100(1)(a)	NP
ACTS	4. Prohibited Activities		
	- investment of $ from pattern or debt	Yes .080(1)	Yes 2923.32(A)(3)
	- investment or control through pattern or debt	Yes .080(2)	Yes 2923.32(A)(2)
	- participation through pattern or debt	NP	Yes 2923.32(A)(1)
	- conspiracy to do the above	Yes .080(3)	NP
	5. Pattern	3 crim., 1 after eff. date, 1 w/in 5 yrs. of prior excl. imprisonment .010(15)	2 crim., 1 after eff. 1 w/in 6 yrs 2923.31(E)
	6. Predicate offenses	Yes .010(14)	Yes 2923.31(I)
	7. Person	NP	Yes 2923.31(G)
	8. Enterprise	Yes .010(12)	Yes 2923.32(A)(3)
	9. State of mind	Knowing .080(1)	
SANCTIONS	10. Sanctions		
	- imprisonment	Class B fel. .080(4)	Fel. 1st deg.
	- fine		Alternative fine 2923.32(b)(1)(2)(a)
	- forfeiture	Yes .100(2)	Yes 2923.32(B)(3)
	- costs	Yes .100(4)(e)	Yes 2923.32(B)(2)(b)(c)
	11. Injunctive relief		
	- restraining order	Yes .090	Yes 2923.33
	- racketeering lien	Yes .120	Yes 2923.36
CIVIL SUIT	12. Proceeding allowed	Yes .100	Yes 2923.34
	13. Brought by		
	- AG	Yes .100(1)(b)	NP
	- DA	Yes .100(1)(b)	Yes 2923.34(A)
	- Private Party	Yes .100(1)(a)	Yes 2923.34(B)
	14. Court	Superior .100(1)(a)	NP
	15. Burden of Proof		
	- Law	Prepond. .100(9)	Clear/convinc. 2923.34(F)
	- Equity	Prepond. .100(9)	Clear/convinc. 2923.34(C)
	16. Provision for innocent parties	Yes .100(3)	Yes 2923.34(C)
	17. Preliminary relief	Yes .100(3)	Yes 2923.34(E)
	- harm requirement	NP	Yes 2923.34(E)
	- bond is an option	NP	Yes 2923.34(E)
	18. Showing for relief		
	- general	NP	NP
	- no special	NP	NP
	19. Scope of equitable relief		
	- divest	Yes .100(4)(a)	Yes 2923.34(C)(1)
	- restrict	Yes .100(4)(b)	Yes 2923.34(C)(2)
	- dissolve	Yes .100(4)(c)	Yes 2923.34(C)(3)
	- reorganize	Yes .100(4)(c)	Yes 2923.34(C)(4)
	- revoke permits	NP	Yes 2923.34(C)(5)
	- forfeit charter	NP	
	20. Scope of legal relief		
	- amount	3x or act. damage .100(4)(d)	3x 2923.34(F)
	- costs	Yes .100(e)	Yes 2923.34(G)
	- attorney fees	Yes .100(e)	Yes 2923.34(G)
PROPERTY SUBJECT	21. Type of property subject to forfeiture	Yes .100(4)(f)	Yes 2923.32(B)(3)
	- real property	Yes .100(4)(f)	Yes 2923.32(B)(3)
	- personal property	Yes .100(4)(f)	Yes 2923.32(B)(3)
	- money	NP	Yes 2923.32(B)(3)
	- may substitute other property if forfeited property is not available	NP	NP
PROCEDURE AND PRIORITY	22. Civil Investigation Demand (subpoena &/or interrogatory)	NP	NP
	23. Seizure without process in certain instances	NP	NP
	24. Relation back	NP	Yes 2923.34(G) (time of action)
	25. Jury trial	NP	NP
	26. Estoppel	Yes .100(8)	Yes 2923.34(J)
	27. Intervention by State	Yes w/certification by AG .100(11)(12)	Yes 2923.34(D)
	28. Civil suit not precluded by criminal action	Yes .100(13)	Yes 2923.32(D)
	29. Priority of individual over State to compensation	NP	Yes 2923.35(b)(1)
	30. Fund for invest. & prosecut.	Yes .110	Yes 2923.35(D)
	31. Reciprocity of enforcement	NP	NP
	32. Statute of limitations	3 yrs. .100(7)	5 yrs 2923.34(K)
	33. Construction	Fair Import 9A.04.020(2)	NP
	34. Severability	Yes .900	NP
	35. Findings & Intent	NP	NP

* NP means No Provision in the statute for this item.
**The provisions of this statute apply only to Drug Racketeering.

STATE RICO SURVEY		Tennessee	New York
EFFECTIVE		July 1, 1986	November 1, 1986
AMENDED			
CRIMINAL ACTION	1. Proceeding allowed	Yes 39-1-1005	Yes 460.00
	2. Brought by		
	AG	NP	Yes 460.30
	DA	NP	Yes 460.30
	3. Court	NP	Yes 460.40
ACTS	4. Prohibited Activities		
	- investment of $ from pattern or debt	Yes 39-1-1004(a)	Yes 460.20(1)
	- investment or control through pattern or debt	Yes 39-1-1004(b)	Yes 460.20(1)(a)
	- participation through pattern or debt	Yes 39-1-1004(c)	Yes 460.20(1)(b)
	- conspiracy to do the above	Yes 39-1-1004(d)	NP
	5. Pattern	2 rel., 1 after eff. date, last w/in 2 yrs prior 39-1-1003(6)	Yes 460.10-106 3 rel. w/in 10 yrs of commencement of criminal action
	6. Predicate offenses	Yes 39-1-1003(2)	Yes 460.102
	7. Person	NP	
	8. Enterprise	Yes 39-1-1003(3)	Yes 460.104
	9. State of mind	Yes, intent, knowingly 39-1-1004(a)	
SANCTIONS	10. Sanctions		
	- imprisonment	10 imp. felony, range II	Class B Fel. 460.30(3)
	- fine	$25,000 alt fine 3x loss/gain	
	- forfeiture	Yes 39-1-1006(b)	
	- costs	Yes 39-1-1005(6)(3)	Yes 460.30
	11. Injunctive relief		
	- restraining order	Yes 39-1-1006(d)	Yes
	- racketeering lien	Yes 39-1-1007(a)	
CIVIL SUIT	12. Proceeding allowed	Yes 39-1-1007(a)	Yes 1353.1
	13. Brought by		
	- AG	Yes 39-1-1006(e)	Yes 1353.1(2)
	- DA	NP	Yes 1353.1(2)
	- Private Party	NP	NP
	14. Court	Cir or Chancery 39-1-1006(a)	Supreme Ct 1353.1(2)
	15. Burden of Proof		
	- Law	NP	NP
	- Equity	NP	NP
	16. Provision for innocent parties	Yes 39-1-1006(c)	Yes 1353.1(2)
	17. Preliminary relief	Yes 39-1-1006(f)	NP
	- harm requirement	Yes	Yes 1353.1(3)
	- bond is an option	Yes	
	18. Showing for relief		
	- general	Yes 39-1-1006(f)	NP
	- no special	Yes 39-1-1006(f)	NP
	19. Scope of equitable relief		
	- divest	Yes 39-1-1006(a)(1)	1353.1(a)
	- restrict	Yes 39-1-1006(a)(2)	1353.1(b)
	- dissolve	Yes 39-1-1006(a)(3)	1353.1(c)
	- reorganize	Yes 39-1-1006(a)(3)	1353.1(c)
	- revoke permits	Yes 39-1-1006(a)(4)	1353.1(d)
	- forfeit charter	Yes 39-1-1006(a)(5)	1353.1(e)
	20. Scope of legal relief		
	- amount	NP	NP
	- costs	NP	NP
	- attorney fees	NP	NP
PROPERTY SUBJECT	21. Type of property subject to forfeiture		
	- real property	Yes 39-1-1006(b)	Yes 460.30(1)(a)
	- personal property	Yes 39-1-1006(b)	Yes 460.30(1)(a)
	- money	Yes 39-1-1006(b)	Yes 460.30(1)(a)
	- may substitute other property if forfeited property is not available	NP	NP
PROCEDURE AND PRIORITY	22. Civil Investigation Demand (subpoena &/or interrogatory)	Yes 39-1-1009(a)	NP
	23. Seizure without process in certain instances	Yes 39-1-1006(e)	NP
	24. Relation back	Yes 39-1-1007(h) (time of notice)	NP
	25. Jury trial	NP	NP
	26. Estoppel	Yes 39-1-1006(g)	NP
	27. Intervention by State	NP	NP
	28. Civil suit not precluded by criminal action	Yes 39-1-1006(i)	460.30(7)
	29. Priority of individual over State to compensation	Yes 39-1-1010(a)	NP
	30. Fund for invest. & prosecut.	NP	NP
	31. Reciprocity of enforcement	NP	NP
	32. Statute of limitations	3 yrs, 39-1-1006(h)	NP
	33. Construction	NP	NP
	34. Severability	Yes	NP
	35. Findings & Intent	Yes 1	Yes 460

* NP means No Provision in the statute for this item.
**The provisions of this statute apply only to Drug Racketeering.

STATE RICO SURVEY		Delaware	North Carolina
EFFECTIVE		July 9, 1986	July 12, 1986
AMENDED		1988, 1986	July 6, 1987
CRIMINAL ACTION	1. Proceeding allowed	Yes 11-15-1501	NP
	2. Brought by		
	AG		NP
	DA		NP
	3. Court		NP
ACTS	4. Prohibited Activities		NP
	- investment of $ from pattern or debt	Yes 1503(a)	NP
	- investment or control through pattern or debt	Yes 1503(b)	NP
	- participation through pattern or debt	Yes 1503(a)	NP
	- conspiracy to do the above	Yes 1503(d)	NP
	5. Pattern	2 rel., 1 after eff. date, 1 w/in 10 yrs. of prior excl. imprisonment 41-1(d),(2)	NP
	6. Predicate offenses		NP
	7. Person		NP
	8. Enterprise	Yes 1502(3)	NP
	9. State of mind		NP
SANCTIONS	10. Sanctions		
	- imprisonment	5-20 years	NP
	- fine	(a) $25,000 fine, (b) or both	
	- forfeiture	Yes 1504(b)	NP
	- costs		NP
	11. Injunctive relief		
	- restraining order		NP
	- racketeering lien		NP
CIVIL SUIT	12. Proceeding allowed	Yes 1505	Yes 75-D-2(6)
	13. Brought by		
	- AG	Yes 1505(b)	Yes 75-D-2(6)
	- DA	NP	No 75-D-3(d)
	- Private Party	Yes 1505(e)	No 75-D-3(d)
	14. Court	Superior 1505(a)	Superior 75-D-8(a)
	15. Burden of Proof		
	- Law		NP
	- Equity		NP
	16. Provision for innocent parties	Yes 1505(b)	Yes 75-D-3(d)(1)
	17. Preliminary relief	Yes 1505(b)	Yes 75-D-3(d)
	- harm requirement		NP
	- bond is an option	Yes 1505(b)	Yes 75-D-3(h)(1)
	18. Showing for relief		
	- general	NP	NP
	- no special		NP
	19. Scope of equitable relief		
	- divest	Yes 1505(b)	Yes 75-D-8(1)
	- restrict	Yes 1505(b)	Yes 75-D-8(2)
	- dissolve	Yes 1505(b)	Yes 75-D-8(3)
	- reorganize	Yes 1505(b)	Yes 75-D-8(3)
	- revoke permits	Yes 1505(b)	Yes 75-D-8(4)
	- forfeit charter	Yes 1505(b)	Yes 75-D-8(5)
	20. Scope of legal relief		
	- amount	3x + punitive 1505(e)	3x 75-D-8(7)(c)
	- costs	1505(e)	NP
	- attorney fees	1505(e)	Yes 75-D-8(7)(c)
PROPERTY SUBJECT	21. Type of property subject to forfeiture		
	- real property	Yes 1506	Yes 75-D-5(a)
	- personal property	Yes 1506	Yes 75-D-5(a)
	- money	Yes 1506	Yes 75-D-5(a)
	- may substitute other property if forfeited property is not available	NP	Yes 75-D-5(1)(2)
PROCEDURE AND PRIORITY	22. Civil Investigation Demand (subpoena &/or interrogatory)	Yes 1509	Yes 75-D-6
	23. Seizure without process in certain instances		Yes 75-D-5(3)
	24. Relation back	Yes 1505(f)	Yes 75-D-5(1)(1)
	25. Jury trial		NP
	26. Estoppel		Yes 75-D-11(e)
	27. Intervention by State		NP
	28. Civil suit not precluded by criminal action	Yes 460.30(7)	Yes 75-D-10
	29. Priority of individual over State to compensation	No 1507(g)	Yes 75-D-8
	30. Fund for invest. & prosecut.	Yes 1511	NP
	31. Reciprocity of enforcement	NP	Yes 75-D-11
	32. Statute of limitations	NP (1505(e) Civil 1 yr. of criminal conv.) 5 yr. 1505(e)	5 years 75-D-9
	33. Construction	NP	NP
	34. Severability	NP	NP
	35. Findings & Intent	Yes 1501	NP

* NP means No Provision in the statute for this item.
**The provisions of this statute apply only to Drug Racketeering.

STATE RICO SURVEY		Oklahoma
EFFECTIVE		Nov. 1, 1988
AMENDED		
CRIMINAL ACTION	1. Proceeding allowed	Yes 1404
	2. Brought by	
	AG	Yes 1404(C)
	DA	Yes 1404(C)
	3. Court	NP
ACTS	4. Prohibited Activities	
	- investment of $ from pattern or debt	Yes 1403(C)
	- investment or control through pattern or debt	Yes 1403(B)
	- participation through pattern or debt	Yes 1403(A)
	- conspiracy to do the above	Yes 1403(D)
	5. Pattern	2 or more occasions not isolated felony 1402(5)
	6. Predicate offenses	Yes 1402(10)
	7. Person	Yes 1402(7)
	8. Enterprise	Yes 1402(2)
	9. State of mind	NP
SANCTIONS	10. Sanctions	
	- imprisonment	10 yrs 1404(A)
	- fine	Alternative fine 1403(A)
	- forfeiture	Yes 1402(A)
	- costs	NP
	11. Injunctive relief	
	- restraining order	Yes 1406, 1407
	- racketeering lien	Yes 1412
CIVIL SUIT	12. Proceeding allowed	Yes 1409(A)
	13. Brought by	
	- AG	Yes 1409(A)
	- DA	Yes 1409(A)
	- Private Party	NP
	14. Court	NP
	15. Burden of Proof	
	- Law	Prepond. 1409
	- Equity	
	16. Provision for innocent parties	Yes 1403(B)(J)
	17. Preliminary relief	Yes 1409(A)
	- harm requirement	No 1409(A)
	- bond is an option	Yes 1409(A)
	18. Showing for relief	
	- general	Conformity 1409(A)
	- no special	NP
	19. Scope of equitable relief	
	- divest	Yes 1409(A)(1)
	- restrict	Yes 1409(A)(2)
	- dissolve	Yes 1409(A)(3)
	- reorganize	Yes 1409(A)(3)
	- revoke permits	Yes 1409(A)(4)
	- forfeit charter	Yes 1409(A)(5)
	20. Scope of legal relief	
	- amount	civil penalty 1409(B)
	- costs	
	- attorney fees	
PROPERTY SUBJECT	21. Type of property subject to forfeiture	
	- real property	Yes 1405(A)
	- personal property	Yes 1405(A)
	- money	NP
	- may substitute other property if forfeited property is not available	Yes 1405(B)(2)
PROCEDURE AND PRIORITY	22. Civil Investigation Demand (subpoena &/or interrogatory)	Yes 1413(A)
	23. Seizure without process in certain instances	NP
	24. Relation back	Yes 1412(B) (time of notice)
	25. Jury trial	NP
	26. Estoppel	Yes 1409(D)
	27. Intervention by State	Yes 1409(E)
	28. Civil suit not precluded by criminal action	Yes 1409(G)
	29. Priority of individual over State to compensation	NP
	30. Fund for invest. & prosect.	Yes 1411
	31. Reciprocity of enforcement	NP
	32. Statute of limitations	5 yrs. 1409(E)
	33. Construction	NP
	34. Severability	NP
	35. Findings & Intent	NP

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* NP means No Provision in the statute for this item.

**The provisions of this statute apply only to Drug Racketeering.

***String Cite.

Ariz. Rev. Stat. Ann. secs. 13-2301 to -2316 (1978 & Supp. 1988); *Cal. Penal Code* secs. 186 to 186.8 (West 1988); *Colo. Rev. Stat*. secs. 18-17-101 to -109 (1986 & Supp. 1988); *Conn. Gen. Stat. Ann.* secs. 53-393 to 403 (West 1985 & Supp. 1989); *Del. Code Ann.* Tit. 11 secs. 1501 to 1511 (1987); *Fla. Stat. Ann.* secs. 895.01 to .09 (West Supp. 1989); *Ga. Code Ann.* secs. 26-3401 to -3414 (Harrison 1988 & Supp. 1988); *Hawaii Rev. Stat.* secs. 842-1 to 12 (1985 & Supp. 1988); *Idaho Code* secs. 18-7801 to -7805 (1987 and 1989 Supp.); *Ill. Ann. Stat.* ch. 56-1/2 paras. 1651-60 (Smith-Hurd 1985) (limited to narcotics); *Ind. Code Ann.* secs. 35-45-6-1 to -2 (Burns 1985 & Supp. 1988); *La. Rev. Stat. Ann.* secs. 15:1351 to 1356 (West Supp. 1989) (limited to narcotics); *Miss. Code Ann.* secs. 97-43-1 to -11 (Supp. 1988); *Nev. Rev. Stat. Ann.* secs. 207.350 to -.520 (Michie 1986); *N.J. Stat. Ann.* secs. 2C:41-1 to - 6.2 (West 1982 & Supp. 1989); *N.M. Stat. Ann.* secs. 30-42-1 to -6 (1978 & Supp. 1988); *N.Y. Penal Law* secs. 460.00 to -.80 (McKinney Supp. 1988); *N.C. Gen. Stat.* secs. 75D-1 to -14 (1987 & Supp. 1988); *N.D. Cent. Code* secs. 12.1-06 to .1-08 (1985 & Supp. 1989); *Ohio Rev. Code Ann.* secs. 2923.31 to .36 (Anderson 1987 & Supp. 1988); *Okla. Stat. Ann.* tit. 22, secs. 1401 to 1419 (West Supp. 1989); *Or. Rev. Stat.* secs. 166-715 to 735 (Butterworth 1985 & Supp. 1988); 18 *Pa. Cons. Stat. Ann.* sec. 911 (Purdon 1983 & Supp. 1989); *R.I. Gen. Laws* secs. 7-15-1 to 11 (1985); *Tenn. Code Ann.* secs. 39-1-1001 to 1010 (Supp. 1988); 18 U.S.C. secs. 1961 to 1968 (1982 & Supp. 1988); *Utah Code Ann.* secs. 76-10-1601 to -1609 (Supp. 1989); *Wash. Rev. Code Ann.* secs. 9A.82.001 to .904 (1988 & Supp. 1989); *Wis. Stat. Ann.* secs. 946-80 to -87 (West Supp. 1987).

[updated July 25, 1989]

Possible Amendments
to
"RICO Reform Act of 1989"
S. 438 (DeConcini)

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[Updated July ~~29~~ 25, 1989]

Possible Amendments to "The RICO Reform Act of 1989"

~~H.R. 1046 (Boucher)~~
S·438 (DeConcini)

I. Present Law:

In 1970, Congress enacted RICO (18 U.S.C. § 1961 et seq.), which prohibits "enterprise criminality," that is, "patterns" of "racketeering," including

(1) violence,
(2) the provision of illegal goods and services,
(3) corruption in government or unions, and
(4) commercial fraud that amounts to crime,

by, through, or against various kinds of entities.

In addition to criminal penalties, the statute authorizes civil remedies, including a treble damage claim for relief with counsel fees.

II. Suggested Reform

Legislation, entitled "The RICO Reform Act of 1989," is being proposed to reform RICO . See S.438, 101st Cong., 1st Sess. (1989); 135 Cong. Rec. S.1652-57 (daily ed. Feb. 23, 1989); H.R.1046, 101st Cong., 1st Sess. (1989); 135 Cong. Rec. E 460-61 (daily ed. Feb. 22, 1989). The bills are offered as a "reform" of RICO, which would end alleged "litigation abuse" by private

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(1) reduce the measure of damages from treble to actual damages,

(2) eliminate the provision for counsel fees for a prevailing party,

(3) exclude the securities and commodities industries from the scope of the 1970 Act, and

(4) apply its provisions retroactively to pending litigation.

Sadly, too, many of the bill's provisions are unclear or ambiguous. Apart from the question of unwise policy, major revisions are required before it can be enacted.

Similar, but less restrictive, legislation failed to pass in the 100th Congress because it was widely perceived to be special interest legislation. Congressman John Conyers, a principal spokesman for those who opposed the legislation, aptly observed:

> [I]n light of the current scandals on Wall Street, I believe that it is wholly unjustifiable to treat securities or commodities fraud in any fashion different from, say, insurance or bank fraud. I see no valid reason why aggravated patterns of criminal behavior in the securities or commodities industries do not merit RICO's enhanced sanctions. I see no ground, in short, for a double standard.
>
> Similarly, I believe that it would be profoundly unwise, wholly inappropriate, and constitute both a troubling and unseemly precedent to make RICO reform retroactive so as to restrict the measure of recovery in pending cases.
>
> I see no reason to give the likes of Boesky or Butcher in their stock fraud or bank fraud activities a special bill of relief. Congress sits to legislate, not settle pending litigation.

134 Cong. Rec. E3720 (daily ed. Oct. 21, 1988) (remarks of Rep. John Conyers).

A need exists both to strengthen and fine-tune RICO, but as the N.Y. Times of October 6, 1988, at 19, col. 1, editorially observed:

> Reducing damages would reduce deterrence. It makes no sense to exempt commodities and securities frauds when these seem rampant. Above all, retroactive relief is unfair. By going along with it, Congress would turn itself into a partial substitute for impartial courts.

Indeed, the most telling objection that can be made to the provisions of the proposed legislation is that little or no relation exists between the allegations of abuse (frivolous

S. 438

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as "The RICO Reform Act of 1989",

Analysis

Several provisions in the bill reflect legitimate efforts to reform RICO. The proposed title, therefore, is not entirely inappropriate. But the central thrust of the proposed legislation--both retroactively and prospectively--would be to tilt RICO litigation sharply in favor of defendants and inhibit the ability of victims of crime, particularly fraud, to vindicate their rights. As such, the bill might be appropriately by reentitled, "The RICO Reform, Defendant's Protection, and Swindler's Relief Act of 1989."

2. Provision: Predicate Offenses

SEC. 2. ADDITION OF PREDICATE OFFENSES.

Section 1961(1) of title 18, United States Code, is amended--

(1) in subparagraph (A), by inserting "prostitution involving minors," after "extortion,";

(2) in subparagraph (B)--

(A) by striking "section 201 and inserting the following: "Section 32 (relating to destruction of aircraft or aircraft facilities), section 81 (relating to arson), section 112 (a), (c)-(f) (relating to protection of foreign officials and other persons), section 115 (relating to acts against Federal officials and other persons), section 201";

(B) by inserting after "sections 471, 472, and 473 (relating to counterfeiting)", the following: "Section 510 (relating to forging of Treasury or other securities), section 513 (relating to forgery of State and other securities),";

(C) by inserting after "section 664 (relating to embezzlement from pension and welfare funds)," the following: "section 378 (relating to threats and extortion),"'

(D) by inserting after "section 1029 (relating to fraud and other activity in connection with access devices)," the following: "section 1030 (relating to fraud in connection with computers).";

(E) by inserting after "section 1084 (relating to the transmission of gambling information)," the following: "sections 1111, 1112, 1114, 1116, 1117 (relating to homicide), section 1203 (relating to hostage taking),";

(F) by striking out "section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant)," and inserting in lieu thereof the following: "section 1501-1506, 1508-1513, and 1515 (relating to obstruction of justice)";

(G) by inserting after "sections 2251-2252 (relating to sexual exploitation of minors)," the following: "section 2318 (relating to vessels),";

(H) by inserting after section 2314 and 2315 (relating to interstate transportation of stolen property)", the following: "section 2318 (relating to counterfeit materials)"; and

(I) by inserting after "section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts)," the following: "section 2331 (relating to terrorist acts abroad),";

(3) by striking out "or" at the end of subparagraph (D);

(4) by striking out the semicolon at the end of subparagraph (E) and inserting in lieu thereof ", (F) any offense under section 134 of the Truth in Lending Act (15 U.S.C. 1644), or (G) section, 5861(b)-(k) of the Internal Revenue Code of 1986 (relating to firearms controls);"

Analysis

RICO was enacted in 1970. Congress has passed significant criminal legislation since then. The new offenses, even though relevant, were not always included in RICO. Similarly, certain relevant offenses, in existence in 1970, were not included in RICO.

The relevant federal crimes in existence in 1970 and enacted since then should be added as predicate offenses. The relevant offenses are those in the areas of

1. violence,
2. provision of illegal goods and services,
3. government corruption,
4. union corruption, and
5. criminal fraud.

In particular, hazardous waste offenses should be added. Such offenses are, in fact, increasingly engaged in by traditional organized crime groups. See 134 Cong. Rec. H. 6788 (daily ed. August 10, 1988) (remarks of Rep. John Conyers). The National Association of Attorneys General recommends this step. 133 Cong. Rec. E. 3362 (daily ed. August 7, 1987) (remarks of Rep. John Conyers) Care should be taken to assure that only substantial, not technical, violations of the relevant statutes are incorporated.

The following hazard waste offenses should be added:

1. Resource Conservation and Recovery Act (42 U.S.C. § 6928), and
2. An offense under a similar provision of a state hazardous waste program authorized by the Administrator of the Environmental Protection Agency under Section 3006 (42 U.S.C. § 6926).

Existing securities offenses ought to be rewritten so as to incorporate them specifically not generally. Some confusion exists on whether or not RICO incorporate the "civil" or the "criminal" provisions of the securities statutes. See, e.g., Frota v. Prudential-Bache Securities, Inc., 639 F. Supp. 1186, 1192 (S.D.N.Y. 1986) (must be criminal); Pandick, Inc. v. Rooney, 632 F. Supp. 1430, 1434 (N.D. Ill. 1986) (must be willful). It ought to be clarified that only the criminal provisions are included.

The appropriate securities and commodities offenses are as follows:

1. the Securities Act of 1933 (15 U.S.C. 77x).
2. the Securities Exchange Act of 1934 (15 U.S.C. 78ff).
3. the Public Utility Holding Company Act of 1935 (15 U.S.C. 79z-3).

4. the Trust Indenture Act of 1939 (15 U.S.C. 77yyy).
5. the Investment Company Act of 1940 (15 U.S.C. 80a-49 and 80B-17), and
6. the Commodity Exchange Act (7 U.S.C. 13).

The following general offenses[3] should be included in RICO:

1. prostitution involving minors under State law.*
2. chapter 51 (homicide) of Title 18.*
3. chapter 73 (obstruction of justice) of Title 18.*
4. chapter 110 (sexual exploitation of children) of Title 18.*
5. chapter 113A (extraterritorial jurisdiction over terrorists acts).*
6. section 32 (relating to destruction of aircraft or aircraft facilities) of Title 18.*
7. section 81 (relating to arson) of Title 18.*
8. section 112 (relating to protection of foreign officials and other persons) of Title 18.*
9. section 115 (relating to assaults and other acts against Federal and other persons) of Title 18.*
10. section 215 (relating to bank bribes) of Title 18.
11. section 373 (relating to solicitation to commit a crime of violence) of Title 18.

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[3] Those offenses in the list that are "starred" are, in whole or in part, in the proposed legislation now.

12. section 666 (relating to theft or bribery in benefit programs) of Total 18.
13. section 831 (relating to prohibited transactions involving nuclear materials) of Title 18.
14. section 844 (relating to explosive materials) of Title 18.
15. section 875 (relating to interstate communications) of Title 18.
16. section 876 (relating to mailing threatening communications) of Title 18.
17. section 877 (relating to threatening communication from foreign country) of Title 18.
18. section 878 (relating to threats) of Title 18.*
19. section 929 (relating to restricted ammunition) of Title 18.
20. section 1203 (involving hostage taking) of Title 18.*
21. section 1362 (relating to communications) of Title 18.
22. section 1363 (relating to buildings) of Title 18.
23. section 1364 (relating to foreign commerce) of Title 18.
24. section 1366 (relating to energy) of Title 18.
25. section 1952A (relating to murder-for-hire) of Title 18.
26. section 1952B (relating to violent crime in aid of racketeering) of Title 18.
27. section 1992 (relating to trains) of Title 18.

28. section 2277 (relating to vessels) of Title 18,* and
29. section 2318 and 2320 (relating to counterfeit and other materials) of title 18.* .

The following fraud-related offenses[4] should be added:

1. section 510 (relating to forging of Treasury or other securities) of Title 18.*
2. section 513 (relating to forgery of state and other securities) of Title 18.*
3. section 1030 (relating to fraud in connection with computers) of Title 18,*
4. section 1344 (relating to bank frauds) of Title 18, and
5. section 134 of the Truth in Lending Act (15 U.S.C. § 1644) (credit card fraud).*

3. Provision: Burden of Proof

SEC. 3. BURDEN OF PROOF.

Section 1964(a) of title 18, United States Code is amended by inserting after "of this chapter by issuing" the following the following: ", upon proof by a preponderance of the evidence.".

Analysis

The provision codifies present law and represents sound policy. See United States v. Cappetto, 502 F.2d 1351, 1357 (7th

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[4] Those starred are, in whole or in part, in the proposed legislation now.

Cir. 1974) (governmental suit), cert. denied, 420 U.S. 925 (1975); Liquid Air Corp. v. Rodgers, 834 F.2d 1297, 1303 (7th Cir. 1984) (private suit); Note, Civil RICO: Prior Criminal Conviction and Burden of Proof, 60 Notre Dame L. Rev. 566 (1985).

4. Provision: Government Suits

SEC. 4. CIVIL RECOVERY.

Subsection(c) of section 1964 of title 18, United States Code,is amended to read as follows:

"(c)(1)(A) A governmental entity (excluding a unit of local government other than a unit of local government other than a unit of general local government), whose business or property is injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court, a civil action therefore and, upon proof by a preponderance of the evidence, shall recover threefold the actual damages to the business or property of the governmental entity sustained by reason of such violation, and shall recover the costs of the civil action, including a reasonable attorneys' fees

"(B) A civil action under subparagraph (A) of this paragraph must be brought by--

"(i) the Attorney General, or other legal officer authorized to sue, if the injury is to the business or property of a governmental entity of the United States;

"(ii) the chief legal officer of a State, or other legal officer authorized to sue, if the injury is to the business or property of a governmental entity of the State;

"(iii) the chief legal officer, or other legal officer authorized to sue, of a unit of general local government of a State, if the injury is to the business or property of the unit of general local government; or

"(iv) a court-appointed trustee, if the injury is to the business or property of an enterprise for which the trustee has been appointed by a United States district court under section 1964(a) of this title.

Analysis

Significantly, these provisions recognize the utility of treble damage litigation coupled with costs and counsel fees as a mechanism to vindicate important public interests. See generally, Note, Treble Damages under RICO, 61 Notre Dame L. Rev. 526, 533-34 (1986) (three functions of treble damages: (1) encourage enforcement, (2) deterrence of violators, and (3) compensation for accumulative harm beyond actual damages). They are, however, defective in two ways:

(1) the exclusion of key governmental entities, and

(2) the exclusion of key kinds of governmental damages.

a. exclusion of key governmental entities

First, the provisions do not include Indian tribes and tribal organizations. See infra (11) for definition of "governmental entity." The sovereignty of Indian tribes is, of course, as fundamental as the sovereignty of States and local units of government. The history of this Nation's treatment of Indian tribes, however, has been characterized by perfidy, mismanagement of solemn trust, and out-right fraud. Sadly, the contemporary story is not different from that of the late 19th century or the early days of this century. See S. Rep. No. 100-510, 100th Cong., 2nd Sess. (1988) (review of recent allegations of wide-spread fraud and abuse in Indian matters). Accordingly, Indian tribes and tribal organizations should be added to the list of governmental entities entitled to sue in the future for treble damages, etc. In light of the retroactive features of the reform legislation, moreover, the failure to add these entities will adversely affect important pending tribal RICO litigation. See, e.g., The Navajo Nation v. Cit. Corp., 5 Civil RICO Report No. 3, p. 6 (June 13, 1989) (RICO suit over purchase at inflated price (more than $10 million) of Big Boquillas Ranch).

Second, they exclude state insurance commissioners, who serve, at the state level, much like governmental insurance entities at the federal level. From 1969 through 1983, state guarantee funds assessed healthy insurers only $454 million to cover claims of insolvent members. N.Y. Times, April 5, 1989, p. 33, col. 1. But in 1987, 234 companies were in liquidation, and 74 companies were in reorganization. Wall Street Journal, Nov. 8, 1988, at A.6. State guaranty funds paid out in 1987 a record $505 million to bail out the failures. Id., Feb. 17, 1989, p. 1, col. 6. "Autopsies of several failed insurers across the country have turned up evidence of frauds and inadequate regulations." Id. "[T]he indirect cost to taxpayers already is growing, because insurers deduct from state taxes their rising assessments from guaranty funds." Id. Accordingly, state insurance commissioners should be added to the list of governmental entities entitled to sue in the future for treble damages, etc. In light of the retroactive features of the reform legislation, moreover, the failure to add state insurance

commissioners will adversely affect important pending RICO litigation in several states. See, e.g., Schacht v. Brown, 711 F.2d 1343 (7th Cir.), cert. denied, 464 U.S. 1002 (1983).

Finally, the "court-appointed trustee" language of (iv) may be too narrow. It is also not implemented in the definition of "government entity" in (11)(A). Either in the text or the legislative history, it should be clarified that it includes other similar court-appointed officers working to clean up racketeer dominated unions or other organizations. See, e.g., United States v. Local 30 United Slate Tile and Composition Roofer, etc., 871 F.2d 401 (3rd Cir. 1989) ("decreeship"). Appropriate language needs to be added to the definition of "governmental entity" to insure that union trustees may sue.

b. exclusion of key kinds of governmental damages

Today, this nation is plagued by fraud in financial institutions--banks, thrifts, welfare and pension funds, securities dealers, and other similar institutions. They are, moreover, failing at unprecedented rates. Governmental and journalistic analyses of these failures agree that a substantial portion of these failures is attributable, not to bad management or poor economic conditions, but to out-and-out fraud. Swindlers have, in short, inflicted untold harm on these financial institutions. See generally, Note, Insider Abuse and Criminal

Misconduct in Financial Institutions: A Crisis, 64 Notre Dame L. Rev. 222 (1989).

Various governmental insurance programs back up these institutions, including, for example, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Pension Benefit Guaranty Corporation, and the Securities Investor Protection Corporation.[5] When these governmental corporations sue for injury to their funds, however, they do not sue directly, but derivatively. See, e.g., SIPIC v. Vigman, 803 F.2d 1513 (9th Cir. 1986). Accordingly, unless the language of the proposed legislation is clarified to assure that "direct or indirect" injury is within the scope of the authorized suits, little of the cost of these financial failures, which is in fact ultimately born by taxpayers, will be recoverable by the government under RICO's treble damage provisions.[6] Accordingly, suits in corporate and liquidator capacity for injury to the fund and to the failed entity must be unequivocally authorized.

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[5] See also Wall Street Journal June 19, 1989, at A7. (HUD mortgage-fraud losses estimated at hundreds of millions of dollars).

[6] The Dallas Bank Fraud Task Force has won 40 convictions out of 56 people charged. Wall Street Journal, July 7, 1989, p. 1, col. 5. Twenty-six indictments have been brought this year compared to 23 last year. Those indicted include 5 presidents and 3 chairmen of thrifts. "[T]he most notorious owners of free wheeling thrifts" still are not indicted, and only $5 million in restitution and fines have been recovered compared with the $157 billion cost of the federal savings and loan bailout. Id. Nothing should be done that would reduce possible recoveries or raise costs to taxpayers.

In light of the retroactive features of the reform legislation, moreover, the failure to add these clarifying provisions will adversely affect pending RICO litigation. The President "solemn[ly] pledge[d to make] every effort to recover assets diverted from these institutions." N.Y. Times, Feb. 7, 1989, p. 31, col. 1. These provisions of the proposed legislation threaten to make more difficult the redemption of the President's promise. In fact, the FDIC and FSLIC, for example, are bringing RICO suits in carefully selected cases. See, e.g., FSLIC v. Shearson American Express, 658 F. Supp. 1331 (D.P.R. 1987); FDIC v. Hardin, 608 F. Supp. 548 (E.D. Tenn. 1985).[7] Those suits will be substantially undercut by the proposed legislation.

5. Provision: General Private Suits For Multiple Damages

> (2) A person whose business or property is injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court,

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[7] Current attention is focused on the thrift crisis, while another scandal, of even more troubling proportions, is brewing. See Wall Street Journal, June 5, 1989, at A6 ("unknown" portion of $1.6 trillion in private pension plan assets--more that thrift and social security combined--at risk in part because of inadequate audits by public accounting firms). See also 134 Cong. Rec. H. 1072 (daily ed. March 22, 1988) (remarks of Rep. John Conyers) (Employment and Retirement and Security Act "alone is not able effectively to protect the plans from fraud and misuse and . . . handearned money at substantial risk."); Thornton v. Evans, 692 F.2d 1064, 1065 (7th Cir. 1982) (pension plan fraud) ("Evidence . . . traces a pattern which seems distressingly prevalent today: the savings of working men and women are pilfered, embezzled, parlayed, mismanaged and outright stolen by unscrupulous persons occupying positions of trust and confidence."). These assets are, of course, "insured" by the Pension Benefit Guaranty Corporation--and the taxpayers.

a civil action therefore and, upon proof by a preponderance of the evidence, shall recover--

"(A) the actual damages to the person's business or property sustained by reason of such violation;

"(B) the costs of the civil action, including a reasonable attorney's fee, if the person whose business or property is injured is--

"(i) a unit of local government other than a unit of general local government; or

"(ii)(I) a natural person, or an organization meeting the definition of exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. § 501(c)(3)), or an organization meeting the definition of an indenture trustee under indenture trustee under the Trust Indenture Act of 1959 (29 U.S.C. § 1001 et seq.), or an organization meeting the definition of a pension fund under the Employee Retirement Income Security Act, or an organization meeting the definition of an investment company under the Investment Company Act of 1940 (15 U.S.C. § 80a-1, et seq.); and

"(II) the person is injured by conduct proscribed by section 21(d)(2)(A) of the Securities Exchange act of 1934 (15 U.S.C. 78 (d)(2)(A)); or

"(iii)(I) a natural person and the injury occurred in connection with a purchase or lease, for personal or noncommercial use or investment, of a product, investment, service, or other property, or a contract for personal or noncommercial use or investment, including a deposit in a bank, thrift, credit union,or other savings institution; and

"(II) neither State nor Federal securities or commodities laws make available an express or implied remedy for the type of behavior on which the claim of the plaintiff is based; and

"(C) punitive damages up to twice the actual damages if the plaintiff may collect costs under the provisions of subparagraph (B) of this paragraph, and the plaintiff proves by clear and convincing evidence that the defendant's actions were consciously malicious, or so egregious and deliberate that malice may be implied.

"In actions in which the plaintiff may collect costs under the provisions of subparagraph (2)(B)(ii) of this paragraph, the calculation of punitive damages also shall be consistent with section 21(d)(2)(C) of the Securities Exchange Act of 1934 (15 U.S.C. § 78u(d)(2)(C)), and the assessment of punitive damages against a person employing another person who is liable under this clause shall be consistent with section 21(d)(2)(B) of the Securities Exchange Act of 1934 (15 U.S.C. § 78u(d)(2)(B)).

Analysis

Currently, RICO authorizes "any person" injured in his "business or property" by reason of "a violation" of its provisions to sue for treble damages and counsel fees. 18 U.S.C. § 1964(c). These provisions, however, only preserve the multiple damage recovery for a limited class of suits under limited set of circumstances against a limited class of perpetrators for a limited range of remedies.

a. who can sue

Under the provisions of the proposed legislation, only the following limited class may sue--

1. units of local government
2. natural persons,
3. charities,
4. indenture trustees,
5. pension funds, and
6. investment companies.

Ostensibly, the purpose of the proposed legislation is to curtail general commercial fraud litigation under RICO. As such, it would make more sense directly to limit--subject to carefully drafted exceptions--such litigation between commercial entities. The sort of general limitation of RICO litigation contained in the proposed legislation, therefore, goes well beyond the rationale of the allegations of misuse.

If the limitation of RICO is to proceed by circumscribing the class who may sue, sound policy reasons may be offered for redrafting the class. It ought to include individuals and entities in our society that are in need of special protection because of their relative vulnerability or because they institutionally represent others, who fall into that class. The list would include at least the following--

1. a defense contractor (including a subcontractor or prospective contractor or subcontractor) meeting (or that would meet) the definition of defense contractor under section 702(f) of the Defense Production Act of 1950 (50 U.S.C. 2152(f));

2. an organization meeting the definition of exempt organizations under section 501(c) or (d) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c) or (d));

3. an organization meeting the definition of an indenture trustee under the Trust Indenture Act of 1939 (15 U.S.C. 77jjj);

4. an organization meeting the definition of a welfare plan, pension plan, or plan under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1), 2(A) or (3));

5. an organization meeting the definition of an investment company under the Investment Company Act of 1940 (15 U.S.C. 80a-3(a));

6. an organization meeting the criteria for a small business concern under section 3 of the Small Business Act (15 U.S.C. 632(a));

7. a financial institution meeting the definition of financial institution under 31 U.S.C. § 5312(2)(A) (insured bank), (B) (commercial bank or trust company), (C) (private banker), (D) (agency or branch of a foreign bank), (E) (insured institution), (F) (thrift institution), (L) (operator of credit card system), (M) (insurance company), or (T) (agency of government),

when such agency is acting for an institution within this subparagraph;

8. a federally chartered or insured financial institution meeting the definition of federally chartered or insured financial institution under 18 U.S.C. § 1344(b); and

9. a person whose business or property is injured is a natural person and the injury occurred in connection with a purchase or lease, for personal or noncommercial use or investment, of a product, service, investment, or other property, or a contract for personal or noncommercial use or investment, including a deposit in a bank, thrift, credit union or other savings institution.

Units of local government belong in the governmental suit provisions.

b. conduct for which suit may be brought

Under the provisions of the proposed legislation, only the following limited class of conduct will remain subject to multiple damage suits--

1. undefined insider trading suits, and
2. defined consumer suits.

Insider trading suits may be brought by units of local government, etc. Only natural persons can bring consumer suits.

1. insider trading

Under present law, insider trading is undefined by statute; its scope under case law and regulations, however, was considerably clarified by the Insider Trading and Securities Fraud Enforcement Act of 1988, 102 Stat. 4677. Accordingly, the drafting of the insider trading provisions of the proposed legislation must be modified. Paragraph (2)(A) has been struck. The new reference should be: Section 21A (15 U.S.C. § 78(v)(1).[8] The insider trading exception seems to be more political than principled. The insider trading stock market scandal involving Ivan F. Boesky and others, rather than anything else, seems to be what accounts for it. Insider trading is, however, hardly the only securities-related violation that is characteristic of recent lawless action on Wall Street. A central allegation, for example, against Michael Milken and others in their 98-count criminal RICO indictment is "parking," that is, selling stock under a secret agreement to repurchase it at a prearranged time and price. The exception for certain kinds of securities fraud should, therefore, be generalized-- or abandoned. Securities fraud--as well as other kinds of swindling--should be treated in a defensible and even-handed fashion.

2. consumer fraud

Certain kinds of consumer fraud are granted special status. The limitation ignores, however, the fact that consumer fraud is not limited to natural persons. In fact, much of the cost of consumer fraud is, in the first instance, born by non-profit organizations, including churches, schools, hospitals, etc. The cost of medical fraud, insurance fraud, coupon fraud, and similar frauds is also initially carried by commercial organizations, but passed on to consumers. The inconsistency between recognizing that a variety of non-natural persons are victimized by insider trading fraud, but not recognizing that a similar variety are victimized by consumer fraud cannot be convincingly defended. If the provision is included to serve the best interests of consumers, it is a half measure, which is too limited in scope to be of great benefit to the group for whose benefit it was ostensibly designed.

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[8] The new provisions, too, clarified original congressional intent and set aside the unfortunate result in Moss v. Morgan Stanley, 719 F.2d 5 (2nd Cir. 1983), (no civil suit for acquiring company insider trading), cert. denied, 465 U.S. 1025 (1984). See H.R. No. 704, 100th Cong., 2nd Sess., 26-88 (1988). See also 133 Cong. Rec. H. 8835 (October. 20, 1987, daily ed.) (remarks of Cong. John Conyers).

Even more troubling is the securities and commodities exception to consumer fraud. First, it is unprincipled. Why exclude securities or commodities fraud from consumer fraud? Nothing that is going on on Wall Street in New York or on LaSalle Street in Chicago warrants it. See generally C. Bruck, The Predators Ball (Pension Book 1989); D. Frantz, Levine & Co. (1987). Second, if it is suggested that current securities and commodities statutes are adequate to deal with widespread patterns of fraud, the scandals themselves surely refute that argument. Third, if it is suggested that RICO-type remedies are inappropriate in routine securities or commodities frauds (the two letters plus one transaction argument), a tighten definition of "pattern" will meet that objection. Indeed, the Supreme Court in the H.J., Inc. appeal has already provided it. H.J., Inc. v. Northwestern Bell Telephone Co., 5 Civil RICO Report No. 5 at 5

(June 27, 1989) (relationship and continuity) ("Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy" the requirement of continuity). But when a systematic pattern of criminal misconduct is present, heightened remedies are appropriate. In drafting RICO, Congress

> acknowledge[d] the break down of the traditional conception of organized crime, and respond[ed] to a new situation in which person engaged in long-term criminal activity often operate _wholly_ within legitimate enterprises. Congress [, therefore,] drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways. _Id._ at 6 (emphasis in original)

Nothing that has happened since 1970 undermines that judgment. Fourth, if every other industry or profession will be subject to a RICO claim for relief, how can the exclusion of these two industries be justified? Here, too, the proposed legislation is neither defensible in itself nor even-handed in reference to others.

Even if the exception is justifiable, it is poorly drafted. It will take thousands of hours of legal research and judicial time to determine its scope, since it incorporates generically all Federal and state law, either express or implied. Similarly, it is fatally flawed by a fundamental ambiguity: the meaning of "type of behavior." The phrase is a "loophole for wrongdoers of Carl Sagen proportions--billions of dollars of fraudulent stolen money may well safely pass through it." 133 Cong. Rec. H.8841 (Oct. 20, 1987, daily ed.) (remarks of Cong. John Conyers). Is the phrase designed to insure that if the defrauded consumer has a remedy under the securities or commodities statutes, it is his or her exclusive remedy, that is, securities or commodities or RICO, but not both? Or is it intended that if the transaction involves "the type of behavior" regulated (expressly or impliedly) by securities or commodities statutes, even though a defrauded consumer may not have a remedy under these statutes (not a "security," not a "purchaser or seller," claim barred by a short state statute of limitations, etc.), he will be precluded from suing under RICO, even though his suit otherwise fully qualifies under RICO, that is, will a gap of "unremedied fraud" exist between the coverage of the securities and commodities statutes and the coverage of RICO? Currently, the text of the proposal is ambiguous, and the legislative history on the point is in conflict. Compare 132 Cong. Rec. S. 16701 (Oct. 16, 1986 daily ed.) (gap present) (remarks of Sen. Patrick Leahy) with id. S. 16698 (gap not present) (remarks of Sen. Howard Metzenbaum). It will be unconscionable if this issue is not clarified before the legislation is enacted. It is difficult, too, to see how the "gap" position can be convincingly defended.

The retroactive impact of this potential loophole will also be sever on the thousands of bank depositors, who recently lost their life savings through fraud, who are not covered by FDIC or FSLIC insurance programs, and who are not able to collect from failed state insurance programs in such states as Maryland, Nebraska, Tennessee, Ohio, and Colorado. Tafflin v. Levitt, 865 F.2d 595 (4th Cir. 1989) illustrates the point. In Tafflin, litigation that grew out of failure of Old Count Savings and Loan, Inc. in Maryland, the depositors sued for a massive fraud under the securities statutes and Civil RICO. The Fourth Circuit held, however, that the "certificates of deposit" at issue were not "securities" within the meaning of Marine Bank v. Weaver, 455 U.S. 551 (1982); it then "abstained" on the Civil RICO claim, referring to state court.[9]

It could, of course, be plausibly contended that while the "certificates of deposit" were not "securities," such transactions are the "type of behavior" that is regulated by the securities acts. If so, the victims in Tafflin-type litigation could end up losing both their securities and their RICO claims. Such a result is not easily justified, particularly since the text of (iii) (I) expressly includes within consumer fraud "a deposit in a bank." In light of the retroactive features of the reform legislation, this result might well obtain in the Tafflin litigation itself and in similar litigation now underway elsewhere. See, e.g., Weimer v. Amen CV 86-6-248 U.S.D. Ct. Neb.

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[9] The Supreme Court has granted certiorari on the question whether or not the Fourth Circuit was correct in holding that state courts have concurrent jurisdiction to hear Civil RICO claims. 5 Civil RICO Report No. 2 at 4 (June 6, 1989).

c. against whom suit may be brought

RICO may, of course, be violated by "any person," who is expressly defined as any "individual or entity." 18 U.S.C. §§ 1961(3), 1962. Similarly, "whoever," which expressly includes individuals, corporations, etc., defines the class who may be indicted. 18 U.S.C. § 1963; 1 U.S.C. § 1. Currently, liability under criminal and civil RICO is, therefore, not only direct, but derivative, although technical rules limit the fact patterns in which derivative liability may be imposed. See generally, Note, Innocence by Association: Entities and The Person-Enterprise Rule under RICO, 63 Notre Dame L. Rev. 179 (1988). The rationale of vicarious responsibility is "in accord with the general common law notion that one who is in a position to exercise some general control over the situation must exercise it or bear the loss." W. Prosser, Law of Torts §§ 69-70 (4th ed. 1971). See also Gay v. Donald, 203 U.S. 399, 406 (1906) (Holmes, J.) ("when a man is carrying on business in his private interest and entrusts a part of the work to another, the world has agreed to make him answer for that other as if he had done the work himself"). It is a mark of the legislative influence of the securities industry that it had, at least until recently, succeeded in narrowing its vicarious liability for multiple damages for insider trading under the securities statutes, and that it has succeeded, at least so far, in writing similar limitations into the proposed legislation. How it can be justified, as a matter of principle, is a different matter.

Under the provisions of the proposed legislation, punitive damages for insider trading must be calculated and assessed vicariously consistent with "section 21(d)(2)(C)" and "section 21(d)(2)(B)". Section 21(d)(2)(C) used to define "profit gained" and "loss avoided" in terms of the trading price for a reasonable period after public dissemination of the non public information. Previously, section 21(d)(2)(B) eliminated (1) aiding and abetting liability; (2) controlling person liability (Section 20(a)), and (3) respondeat superior liability. The notion under the present draft that the legislation includes, therefore, an effective remedy for insider trading is a half-truth. In fact, liability is personal or not at all; practically, deep pocket defendants are excluded from the bill. As such, a right without a meaningful remedy is all that the bill affords a victim of insider trading in most situations. Those insider trading provisions were, however, struck from current law by the Insider Trading and Securities Fraud Enforcement Act of 1988, 102 Stat. 4677. Under the new provisions, "profit gained" or "loss avoided" is now defined in Section 21(A)(F) (15 U.S.C. § 78(U)(1)(F)). Accordingly, appropriate modifications will have to be made in the proposed legislation, if these concepts are to be retained. Under the new provisions, moreover, controlling person liability is imposed, not eliminated, by Section 21A(a)(3) and (b). In addition, in sharp contrast to prior law, aiding and abetting liability is not expressly restricted. "Controlling person" liability is expressly enacted, and it is keyed to reckless disregard, failure to take appropriate steps to prevent, or knowingly or recklessly failing to establish maintain or enforce policies that substantially contributed to the violation. Finally, respondeat superior liability is expressly equated to controlling personal liability. See generally, H.R. No. 701, 100 Cong., 2nd Sess., 17-20 (1988).

Obviously, the new authorizations and restrictions on vicarious liability for insider trading that stem from the 1988 Act are not as objectionable as the former provisions, but they well-illustrate, nevertheless, the special interest character of the proposed legislation. Why should the securities industry have special vicarious liability rules for multiple damage suits written for it that do not apply to other kinds of swindlers? Treble damages are, for example, vicariously applicable under the usual rules for violations of those antitrust provisions that protect freedom in the marketplace. See, e.g., American Society of Mechanical Engineers, Inc. v. Hydrolevel, 456 U.S. 556, 573-74 (1982). Why should different rules be applicable when integrity in the marketplace is at issue under RICO? If multiple damages, when imposed vicariously, are a special problem, they are a special problem for every one under all statutes, not just one industry under RICO.

Accounting firms are, for instance, deeply--and legitimately--concerned about the effect of treble damages liability. In particular, because they practice under a partnership form, they do not have the benefit of the limited liability of the corporate form. The E.M.S. Government Securities, Inc. litigation illustrates the point. See In Re Alexander Grant & Co. Litigation, 110 F.R.D. 528, 530-31, 539-43 (S.D. Fla. 1986) (text of indictment). Because of the bribery of a Florida accountant, who worked for Grant Thornton, an accounting firm, the insolvency of E.S.M. Government Securities, Inc. was fraudulently hidden, but when the inevitable occurred, the entire savings and loan industry in Ohio virtually collapsed. Subsequently, Grant Thornton reached a multi-million dollar settlement of a RICO suit with a number of thrifts and municipal governments, which had invested in government securities through E.S.M. See N.Y. Times, Sept. 17, 1986, col. 6., p. 48. Was it fair for the innocent partners of Grant Thornton outside of Florida to be held vicariously--and personally--liable for multiple damages for the corrupt conduct of the Florida partner? I do not necessarily agree with it, but the accountants have a good argument that it was not. Nevertheless, under the proposed legislation, accountants will be subject to punitive damages under the usual rule of vicarious liability for consumer fraud not involving securities. Why treat the security industry one way and the accounting profession another? No convincing rationale for this anomalous result can be offered. The bill, in short, is neither principled nor even-handed.

Actual damages, of course, play primarily a compensation role, although they are, in fact, not "actual." In truth, they ought to be called "legal" damages, since they do not actually compensate; they exclude, for example, "transaction" and "opportunity" costs, as those terms are used in economic analysis. See R. Posner, Economic Analysis of Law §§ 1.1 (fundamental concepts), 21.4 (transaction costs in settlements) (2nd ed. 1977). Multiple damages, of course, play a variety of other roles, whether they are punitive or treble. Accordingly, it might make sense to consider restricting the application of RICO's multiple damages--punitive or treble--along the lines that the Model Penal Code § 2:07 (1962) (high managerial agents at least recklessly tolerated) restricts corporate criminal liability. The issues are similar; similar approaches would be preferable to the unjustifiable approach of the proposed legislation. If treble damages were generally authorized, but individuals or entities were given a defense that would reduce multiple damage liability to actual damages, if the individual or entity did not at least recklessly tolerate the conduct constituting the RICO violation, the public interest might be well served.[10] The current provisions ought, therefore, to be rejected, and a more justifiable and even-handed reform adopted.

d. remedy authorized

Currently, RICO authorizes automatic treble damages and counsel fees. If the matter is settled, even though a plaintiff "substantially prevails," counsel fees may not be awarded. Aetna Casualty and Surety Co. v. Liebowitz, 730 F.2d 905 (2nd Cir. 1984). The cases are split, too, on the availability of equity-type relief under RICO. Compare Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1080-89 (9th Cir. 1986) (denied as a matter of legislative intent, despite sound policy reasons in support), cert. denied, 107 S. Ct. 1336 (1987) with Chambers Development Co., Inc. v. Browning Ferris Industries, 590 F. Supp. 152, 1540-41 (W. D. Pa. 1984) (equity relief granted under RICO).

Under the provisions of the proposed legislation, the remedies authorized are actual damages and counsel fees, and upon a showing of clear and convincing evidence, up to double punitive damages.

Because treble damages are superior to punitive damages, they should be retained. Treble damages are mandatory, not discretionary, so they contain an appropriate balance of swift, sure, and sever deterrence; they are related to the damage done to the victim, not to the conduct or wealth of the defendant, so they avoid prejudice to the defendant; and they are not penal in character, but compensate for accumulative harm, so they carry an appropriate measure of compensation for the victim. See generally, Note, Treble Damages Under RICO, 61 Notre Dame L. Rev. 526, 527-28 (1986). As such, treble damages serve the public interest better than punitive damages.

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[10] Since the individual or entity would, of course, be in the best position to prove that he or it did not at least reckless, etc., the exception ought to be an affirmative defense on which the burden of persuasion ought to lie on him or it. See generally, J. Thayer, Preliminary Treatese on Evidence ch. 9, (1898).

Eliminating treble damages in private claims for relief and circumscribing the authorization of punitive damage by a unique substantive standard ("consciously malicious, etc.") and a heightened burden of proof ("clear and convincing, etc.") will create indefensible anomalies in federal law. Treble damages are, for example, awarded in private antitrust litigation without any additional showing or a heightened burden of proof. Rumsey v. UMW, 401 U.S. 302, 307-11 (1971) (preponderance of evidence). Why should violence or corruption in the marketplace under RICO be treated differently than freedom under the antitrust statutes? No convincing rationale for this anomaly can be offered.

Punitive damages, too, are generally awarded in federal law on no greater showing than "reckless or callous indifference." Smith v. Warde, 461 U.S. 30, 56 (1983) (civil rights). Why treat punitive damages under RICO differently? Nor must a special burden of proof be met to obtain punitive damages under general Federal law. *See*, *e.g.*, *Central Armature Works, Inc. v. American Motorist, Inc.*, 520 F.Supp. 283, 293 (D. DC 1981) (bad faith failure to defend insured) (contention that "entitlement to punitive damage must be proven by 'clear and convincing' evidence . . . (without) support. . ."). To be sure, the matter is no longer well-settled under state law, where, by statute or decision, some jurisdictions, as part of general and ill-fated tort reform, have moved to the clear and convincing standard. *See* *Wall Street Journal*, Aug. 1, 1986 at 6 (state law changes summarized) ("while 31 states have made changes in the way lawsuits are tried and damages awarded, the moves aren't expected to yield broad benefits for insurers or their customers") The better reasoned judicial opinions still maintain the traditional rule. *Compare* *United Nuclear Corp. v. Allendale Mutual Ins. Co.*, 103 N.M. 480, 709 P.2d 649 (1985) (traditional rule retained) *with* *Linthicom v. Nationwide Life Ins. Co.*, 150 Ariz 326, 723 P.2d 675 (1986) (adoption of clear and convincing). *See generally* 58 ALR 4th 878 (1987). Moreover, under state RICO legislation, the preponderance standard is usually specifically retained. *Compare* *Ariz Rev. Stat. Ann.* § 13-2314I (1978 & Supp. 1984-85) ("preponderance") *with* *Wis. Stat. Ann.* § 946.80(5) (West Supp. 1984-85) ("reasonable certainty").

The rationale for the retention of the traditional rule on burden of proof is persuasive. "[A] standard of proof serves to allocate the risk of error between . . . litigants . . . ." Herman and MacLean v. Huddleston, 459 U.S. 375, 389 (1983) (quoting Addington v. Texas, 441 U.S. 418, 423 (1979). "Any . . . standard [other than preponderance] expresses a preference for one sides interests." Id. at 390 (held: securities fraud, like antitrust and civil rights, is preponderance). Where a person is injured by a pattern of unlawful conduct that would, if prosecuted by the government, amount to a crime, it is difficult to see how the Congress could justifiably put its thumb on the side of the scale of the perpetrator. See generally, Note, Prior Criminal Conviction and Burden of Proof 60 Notre Dame L. Rev. 566, 580-88 (1985).

Modifications of the counsel fee provisions of RICO and the proposed legislation are also in order. Counsel fees ought to be awarded in all RICO litigation. More than 119 federal statutes authorize granting counsel fees to a prevailing party. See Mark v. Chesny, 475 U.S. 1, 43-51 (1985) (Brennan, J. in dissent) A failure to award counsel fees to those injured by violations of RICO would be grossly invidious. They ought to be recoverable, too, not only on an award of damages, but also, if the injured party "substantially prevails."

Finally, a provision ought to be added to the proposed legislation guaranteeing that a victim of a RICO violation may obtain full justice, that is, the court ought not be artificially limited to the award of only legal relief; it ought also to be able to grant equity relief. See generally, Blakey, Equitable Relief Under RICO, 62 Notre Dame L. Rev. 526 (1987). Unless such relief is available, private parties will not be able to secure, under a uniform rule, full justice. Forum shopping, too, will be promoted. Pendent jurisdiction is an unreliable basis on which to depend for injunctive relief. See, e.g., Matek v. Morat, 862 F.2d 720, 732-34 (9th Cir. 1988) (state claim under pendent jurisdiction dismissed as matter of discretion; basis for equity jurisdiction lost). It is particularly necessary that preliminary orders be obtained that will prevent the dissipation of assets prior to judgment be available. See, e.g., Republic of Philippines v. Marcos, 862 F.2d 1355 (9th Cir. 1988) (injunction to prevent dissipation of assets of former dictator upheld under California law); FDIC v. Antonio, 843 F.2d 1311 (10th Cir. 1988) (injunction to prevent dissipation of assets of bank swindlers upheld under Colorado RICO law); Int'l Control Corp. Vesco, 490 F.2d 1334 (2nd Cir. (injunction to prevent dissipation of corrupt financier assets, including Boeing 707 and a yacht upheld under securities statutes), cert. denied, 417 U.S. 932 (1974).[11]

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[11] In 1975, English law moved away from an older view that was unsympathetic to injunction to preserve assets. Traditionally, injunctions against persons to restrain the removal of assets were not permitted in English law under Lister & Co. v. Stubbs, [1890] 45 Ch. D. 1. The historical materials

Unless assets can be preserved during litigation against organized crime or fly-by-night white-collar offenders, it is doubtful that RICO litigation will even be instituted against them. Ironically, that may mean that RICO will be only used against white-collar offenders, who have substantial assets in the community. Those who object to RICO litigation outside of the organized crime area can hardly be heard to support this result.

6. Provision: Personal Injury Private Suits for Multiple Damages

> (3) A natural person who suffers serious bodily injury by reason of a crime of violence that is racketeering activity and that is an element of a violation of section 1962 of this title may bring a civil action in an appropriate United States district court, and, upon proof by a preponderance of the evidence, shall recover--
>
> "(A) the costs of the civil action, including a reasonable attorneys' fee;
>
> "(B) the actual damages to the person's business or property sustained by reason of such violation;
>
> "(C) the actual damages sustained by the natural person by reason of such violation, as allowed under

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are reviewed in Rau Maritim v. Pertambangan, [1977] 3 All.E.R. 324, 331 (Denning, J.) Mareva v. International Bulkcarriers, [1975] 2 Lloyds Rep. 509, marked a dramatic turn, for it upheld the issuance of injunctions to freeze assets. A new test was formulated in Chandris Shipping v. Unimarine, S.A., [1979] 2 All.E.R. 972, 984-85 (Denning, J.). While at first the new test seemed to be applicable only to international litigation, in Barclay-Johnson v. Yuill [1980] 3 All.E.R. 190, 194, it was made to rest solely on the "risk of removal of assets." See also, Prince Abdul v. Abu-Taha [1978] 3 All.E.R. 409, 412. The present state of English law, in which such injunctions are fairly easily obtained, is reflected in Bayer A.G. v. Winter, [1986] 1 All.E.R. 733, 737. See generally, Profits of Crime and Their Recovery: Report of Howard League for Penal Reform 104-111 (1984) (discussions of Mareva injunctions).

> applicable State law, (excluding pain and suffering); and
>
> "(D) if the plaintiff proves by clear and convincing evidence that the defendant's actions were consciously malicious or so egregious and deliberate that malice may be implied, punitive damages up to twice the actual damages.

Analysis

Currently, RICO does not authorize recovery for personal injuries. See, e.g., Grogan v. Platt, 835 F.2d 844, 845-48 (11th Cir. 1988) ("property" within RICO does not include economic *aspects of murder of FBI agents); Drake v. B.F. Goodrich Co., 782 F.2d 638, 644 (6th Cir. 1986) (RICO does not include toxic chemical personal injury; Campbell v. Robins Co. Inc., 615 F. Supp. 496, 501 (W.D. Wis. 1985) (Dalkon Shield) (RICO does not include personal injury in products liability claim).

These provisions would afford a natural person, who suffers serious bodily injury by reason of a crime of violence that is racketeering activity and that is an element of a violation of RICO, a claim for relief. Recovery is limited to the immediate person. "Serious bodily injury" is not defined. "Crime of violence" is given a special definition in (11)(c), which is narrower than 18 U.S.C. § 16 (use, alleged use, or threatened use of physical force against person or property or felony that involves substantial risk use of physical force against person or property). Recovery is authorized for--

(1) counsel fees,

(2) actual damage to business or property, and

(3) actual damages to person (excluding pain and suffering) allowed under applicable state law plus

(4) up to two times punitive damages if the conduct is consciously, etc. and a showing of clear and convincing evidence.

These provision are seriously defective. The rationale for the limitation of RICO in the proposed legislation is its abuse in commercial fraud litigation. Objection is not voiced to RICO's use against other types of offenders. It is difficult to justify, therefore, the sharp limitations proposed on the extension of RICO to suits involving personal injury based on crimes of violence.

a. limitations to immediate serious bodily injury

Why limit the recovery to the immediate person? What of his family? If an individual is injured, why limit his right to recover to "serious" bodily injury. Recovery for less than serious bodily injury would, of course, be possible under a pendent state claim, but since those claims may not be retained in the litigation, it is possible that a legitimate dispute over "seriousness" might be resolved, after discover and trial, by the jury against the plaintiff. If so, the result might be no recovery for the victim, even though the case had gone to trial and the jury had concluded that the basic claim was meritorious.

This limitation, therefore, invites the waste of Federal judicial resources and multiple proceedings without substantial countervailing gains for the administration of justice. It also maltreats victims of crime of violence.

b. limitation of crimes of violence narrowly defined

(11) (c) defines "crime of violence" to mean--
- (1) State law: the offenses of murder, kidnapping, arson, robbery, or dealing in narcotic or others dangerous drugs, and
- (2) Federal law: the offenses under Title 18 when accompanied by serious bodily injury of--
  - (i) section 32 (destruction of air craft, etc),
  - (ii) section 81 (arson),
  - (iii) section 112 (a) (violence to foreign official etc.)
  - (c) - (f) (definitions and limitations)
  - (iv) section 115 (assaults etc. of United States officials, etc.)
  - (v) section 878 (threats etc. to foreign officials, etc.)
  - (vi) section 891-94 (extortionate credit transaction),
  - (vii) section 1111-12 (murder and manslaughter), 1114 (killing or attempted killing; 1116-17 (killing or attempted killing or conspiracy to kill),
  - (ix) section 1203 (hostage taking),
  - (x) section 1501-06 (obstruction of justice); 1508-13 (obstruction of justice); 1515 (obstruction of justice),
  - (xi) section 1951 (extortion)
  - (xii) section 1958 (murder for hire)
  - (xiii) sections 2251-52 (sexual exploitation of children); 2256 (definitions),
  - (xiv) section 2278 (explosives, etc. on vessels)
  - (xv) section 2331 (terrorist acts abroad), or
  - (xvi) felonious drug offenses under federal law.

This definition is, of course, more narrow than the general definition of crime of violence in 18 U.S.C. § 16. It also excludes the following obvious crimes of violence expressly within RICO now--

(1) State law: extortion
(2) Federal law--
  (i) section 1951 (robbery),
  (ii) section 1952 (crime of violence, extortion, arson and drugs)

These omissions do not reflect any easily discernible rationale. Given the rationale of the proposed legislation of limiting RICO's misuse in commercial litigation, it is difficult to understand why the crabbed approach of the proposed legislation was adopted. It promises little gain and much loss. It would be preferable to adopt the general definition of "crime of violence" in 18 U.S.C. § 16.

c. limitation to element of violation

Under the provisions of the proposed legislation, a natural person, who suffers serious bodily injury by reason of a crime of violence, would have to show that--

(1) it is racketeering activity, and
(2) it is an element of a RICO violation.

These two limitations will produce essential irrational results. The prosecution in United States v. Zemek, 634 F.2d 1159 (9th Cir. 1980), cert. denied, 450 U.S. 985) (1981) and a subsequent civil suit well-illustrate the point. In Zemek, various defendants were convicted under RICO for attempting to gain a monopoly over the tavern and topless bar business in Pierce County, Washington, by a pattern of offenses, including murder, arson and extortion. It is difficult to imagine a more appropriate RICO criminal prosecution. In Rice v. Janovich, 109 Wash.2d 48, 742 P.2d 1230 (1987), a janitor and night watchman of one of the taverns, which was fire bombed, sued for lost wages that resulted from an assault that occurred during the RICO violation. It is difficult to imagine a more appropriate civil RICO suit. While the assault was not a racketeering act, the janitor, nevertheless, recovered, since it was an overt act engaged in pursuant to a RICO conspiracy under 18 U.S.C. § 1962(d). The proposed legislation, at least in theory, is designed to extend to natural persons, like the janitor in Rice, the right to recover, not only for property damage, but also for serious bodily injury for crimes of violence; it would not, however, permit him to recover for his bodily injury, even though it might be serious, and it occurred during the course of and in furtherance of a RICO violation, since the assault, although an overt act pursuant to a RICO conspiracy, was neither a racketeering act nor an element of the violation. That result would be indefensible. As such, these limitations ought to be taken out of the proposed legislation. Any injury by any crime of violence engaged in during the course of and in furtherance of a RICO violation ought to be the basis for a claim for relief. Any other result would be unjust.

d. limitation to damage (excluding pain and suffering) allowable under applicable state law

If the basic recovery is to be limited to actual damages, no reason exist to exclude pain and suffering. If the actual damages were automatically trebled, this limitation might be justifiable, but even then, situations are easily imagined where the such limited recovery would be unjust. Indeed, pain and suffering may be the most serious aspect of an injury stemming from an offense involving bodily injury. A disfigurement inflicted on another as part of an extortion or to intimidate a witness, for example, may well result principally in mental pain and suffering. In addition, the limitation to damages "allowable under applicable state law" assumes that state law would be applicable. The bombing of Pan Am Flight No. 103 in December of 1988 took place over Scotland, not the United States; it killed 270 persons, including 189 Americans. It is generally thought to be one of a series of international terrorist acts directed toward Americans. See Patterns of Global Terrorism: 1988 1 (U.S. Department of State, 1989). The amendment of RICO to include new violent predicates and to includes more than injury to business or property ought to reflect a less parochial imagination. See Wall Street Journal, July 7, 1989, p. 1, col. (story on how the bombing of Pan Am Flight No. 103 affected the lives of the families of the victims) (children of John Commock, one of the dead, asked their mother, "Where are the terrorists? Are they going to come here and kill you Mommy? Will they kill us, too?") Why, to protect securities dealers and accountants from fraud suits, it is necessary to circumscribe the rights of others, where they are the victims of crimes of violence, is difficult to justify?

e. limitation to punitive damages on special standard and burden of proof

Here, of all places, treble damages without any special standard or burden of proof ought to be retained. Treble damages provide an appropriate measure of swift, sure, and sever deterrence. Where crimes of violence are concerned, no convincing reason can be offered for abandoning treble damages in favor of specially circumscribed punitive damages.

7. Provision: Limitation on Order of Proof

> (4) In an action under this subsection, evidence relevant only to the amount of punitive damages shall not be introduced until after a finding of liability, except the court may permit, for good cause shown and in the absence of any undue prejudice to the defendant, introduction of such evidence prior to a finding of liability on motion of a party or in the exercise of it discretion.

Analysis

Federal courts, like courts generally, possess, and have possessed traditionally, ample discretion to vary the order of the introduction of evidence. See .e.g., Philadelphia & T.R. Co. v. Stimpson, 39 U.S. (14 Pet) 448, 463 (1840) (Story, J.). Only mischief will result from this effort to micro-manage Federal litigation at the trial court level. It is likely that it would as a practical matter, moreover, mandate bifurcated trials, which is hardly a justifiable result in legislation that has as one of its ostensible purposes a concern with the conservation of judicial resources. "Good cause" and "undue prejudice", too, are concepts that would invite appeals and reversals on points that ought to be handled far more flexibly. J. Wigmore Evidence § 1867 at 500-01 (3rd ed. 1940) aptly observes:

> [E]rror in the allowance of . . . a variation [in the order of proof] should rarely be treated as sufficient ground for a new trial. . . . [T]he trial court can better be trusted to understand the situation. . . . [N]o opportunity should be lost to lament the abuse by which . . . rules of customary order are sought to be turned into flexible dictates of absolute justice . . . . Courts often lend ear to such appeals, and thereby partake in the abuse of such a practice. To purport to preside over the investigation of truth, and then, at an inordinate expense of time, labor and money to insist on reopening the entire investigation . . . is to furnish a spectacle fit to make Olympus merry over the serious follies of mortals.

Accordingly, this provision ought to be struck from the proposed legislation, and the matter left to the good sense and sound discretion of trial judges where it properly belongs.

8. Provision: Treble Damages for Injury to Business or Property After Criminal Conviction

> (5) (A) A person whose business or property is injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court, a civil action therefore and, upon proof by a preponderance of the evidence of such violation, shall recover threefold the actual damages to the person's business or property sustained by reason of such conduct, and the costs of the civil action, including a reasonable attorneys' fee, from any defendant convicted of a Federal or State offense described in subparagraph (b).
>
> (b) The offense referred to in subparagraph (a) must--
>
> (i) be based upon the same conduct upon which the plaintiff's civil action is based;

> (ii) include a showing of a State [sic] of mind as a material element of the offense; and
>
> (iii) is punishable by death or imprisonment for a term of more than one year.

Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) held that a claim for relief under RICO was not circumscribed by a prior criminal conviction limitation. As such, the Court followed, not only the language of the statute, but the amply supported and traditional rule. See generally, Civil RICO: Prior Criminal Conviction and Burden of Proof, 60 Notre Dame L. Rev. 566 (1985). The Court aptly observed:

> [The criminal conviction limitation] arbitrarily restricts the availability of private actions, for lawbreakers are often not apprehended and convicted. Even if a conviction has been obtained, it is unlikely that a private plaintiff will be able to recover for all of the acts constituting an extensive 'pattern,' or that multiple victims will all be able to obtain redress. This is because criminal convictions are often limited to a small portion of the actual or possible charges. The decision below [imposing a criminal conviction limitation] would also create peculiar incentives for plea-bargaining to non-predicate act offenses so as to ensure immunity for a later civil suit. If nothing else, a criminal defendant might plead to a tiny fraction of counts, so as to limit future civil liability. In addition, the dependence of potential civil litigants on the initiation and success of a criminal persecution could lead to unhealthy private pressures on prosecutors and to self-serving trial testimony, or at least accusation thereof. Problems would also arise if some or all of the convictions were reversed on appeal. Finally, the compelled wait for the completion of criminal proceedings would result in pursuit of stale claims, complex statute of limitations problems, or the wasteful splitting of actions, with resultant claim and issue preclusion complications. 473 U.S. at 490 n.9.

The matter is considered at greater length in 133 Cong. Rec. H.9050 (daily ed. Oct. 27, 1987) (remarks of Cong. John Conyers on position of the Department of Justice in support of a criminal conviction limitation).

The proposed provisions are somewhat mitigated to the degree that they do not circumscribe all claims for relief. Nevertheless, the central strictures of the Court's analysis remain. In truth, the provision is ill-designed, unfair, and ill drafted. It is ill-designed principally because it would adversely affect plea bargaining in criminal prosecutions, cross examination in criminal trials, and the decision to bring criminal charges. No prosecutor ought to be able to affect the measure of civil damages, as he selects charges. His stick is big enough now. The creditability of witnesses, too, ought not be judged on the basis of what they might receive if the defendant is convicted. Nor should prosecutors be subject to pressures to bring cases, so that private litigants can recover a higher measure of damages. It is unfair, since it does not extend the treble damage liability to those equally culpable--to aiders and abettors, conspirators, and others responsible for the defendant's conduct. Similarly situated perpetrators ought to be treated similarly. Justice requires no less. No reason appears, moreover, why the kind of damages for which a treble measure may be recovered ought to be limited to injury to business or property. Why not include all injury? Nor should the provisions be limited to Federal or state offenses. Why not include foreign offenses, which would be a Federal or state offense if prosecuted in the United States? Many countries refuse to extradite terrorists, but are willing to try them in their own courts. See Patterns of Global Terrorism: 1988 at 34-35 (Department of State 1989) (trial of Lebanese for air piracy and murder of Navy diver, Robert Stethem, during June 1985 hijacking of TWA Flight 847). It makes little sense not to include these convictions. Finally, the provision is ill-drafted. If what is intended is the exclusion of strict liability offenses, the present language does not accomplish that objective. Paragraph (B) (ii) should read "include a showing of a state of mind for each material elements of the offense" (emphasis added).

9. Provision: Statute of Limitations

> (6)(A) Except as provided in subparagraph (B), a civil action or proceeding under this subsection may not be commenced after the latest of--
>
> "(i) four years after the date the cause of action accrues; or
>
> "(ii) two years after the date of the criminal conviction required for an action or proceeding under paragraph (5) of this subsection.
>
> "(B) A civil action brought pursuant to subsection (c)(1)(B)(i), (ii), or (iii) may not be commenced more than 6 years after the date the cause of action accrues.
>
> "(C) The period of limitation provided in subparagraphs (A) and (B) of this paragraph on a cause of action does not run during the pendency of a government civil action or proceeding or criminal case relating to the conduct upon which such cause of action is based.

Analysis

Currently, the period of limitations for private Civil RICO is, by case decision, four years. Agency Holding Corp. v. Mally-Duff & Associates, Inc., 107 S.Ct. 2759, 2767 (1987). The limitations for general Federal government suits vary. See, e.g., 28 U.S.C. § § 2415, 2416 (contract, express or implied, six years; tort three years, except six years for diversion of money paid or conversion). It is not clear if Mally-Duff applies to government suits. See United States v. Bonanno Organized Crime Family, 683 F.Supp. 1411, 1457-58 (S.D.N.Y. 1988) (issue not decided).

Arguably, the provisions of the proposed legislation do little more than codify present law. They ought to do more. Of the 21 state RICO statutes that provide for multiple damages, 15 have special statutes of limitation. The usual period if five years, although others are longer. See, e.g., Wis. Stat. Ann. § 946.87 (1) (West Supp. 1984-85) (6 years); Ariz. Rev. Stat. Ann. §§ 13-2314(G) (1978 & Supp. 1984-85) (7 years). The general Federal criminal period is five years. 18 U.S.C. § 3282. Every effort ought to be made, where possible, to parallel Federal and state RICO, both criminal and civil, to avoid unseemly results and forum shopping. The civil period of limitations for private suits, therefore, ought to be extended to five years.

10. Provision: Affirmative Defense for Good Faith and Limitations on Discovery

> **(7) (A) It shall be an affirmative defense to an action brought under this subsection that a defendant acted in good faith and in reliance upon an official, directly applicable regulatory action, approval, or interpretation of law by an authorized Federal or State agency in writing or by operation of law.**
>
> **(b) Before the commencement of full discovery on and consideration of the plaintiff's claim, the court shall determine, upon defendant's motion, the availability of any affirmative defense asserted under this paragraph. However, the discovery of any such defense shall be allowed, as provided by law or rule of procedure, prior to the court's determination of the availability of such an affirmative defense.**

Analysis

Currently, good faith is a defense to a charge including "intend to defraud." See, e.g., Durland v. United States, 161 U.S. 306, 314 (1896) (mail fraud). Good faith may generally be established through reliance on advice of counsel. See, e.g., Tarvestad v. United States, 418 F.2d 1043, 1047 (8th Cir. 1969) (securities statutes).

The provisions of the proposed legislation, however, are unnecessary, ill-advised, and poorly drafted. To the degree that the provisions codify traditional rules, they are unnecessary. To the degree that they make the defense an "affirmative" defense, it leaves it unclear what their impact will be. Is it intended to shift the burden of coming forward with evidence and persuasion? It is doubtful that that is what the drafter intended, if their single-minded pursuit of the interests of defendants elsewhere is any guide. Why then use the "affirmative defense" language? To the degree that they make the defense applicable solely on "reliance upon, etc.", it leaves it unclear what their impact will be. Is it intended to limit the present defense of advice of counsel? Here, too, it is doubtful that that is what the drafters intended. Nevertheless, by setting out the elements of a new affirmative defense, it is likely that that will be the result, as the general rule is expressio unius est exclusio alterius. H. Broom, Legal Maxims 668 (7th Am. ed. 1874). While current law generally affords an advice of counsel defense to fraud or similar offenses, the proposed language is not so limited. It is really intended to extend it across the board to crimes of violence and other offenses? What showing of need justifies that radical change? Finally, as above on the question of the order of proof, the question of discovery and summary judgment on affirmative defenses is best left to the sound discretion of trial judges. Here, too, it is unwise for the Congress to attempt to micro-manage trial procedure, certainly not in a bill ostensibly designed to conserve judicial resources.

11. Provision: Pleading With Particularity

> (8) In an action under this subsection, facts supporting the claim against each defendant shall be averred with particularity.

Currently, Fed. R. Civ. Pro. 9(b) requires fraud to be plead with particularity. Rule 9(b) applies, of course, to the fraud elements of RICO. Caymon Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1362-63 (10th Cir. 1989) (cases collected). Case law also applies a similar requirement to allegations of conspiracy. See, e.g., Slothick v. Garfinkel, 632 F.2d 163, 165 (1st Cir. 1980).

To the degree that these provisions of the proposed legislation codify present law, they are unnecessary. To the degree that they would extend particularity pleading beyond present law, they are profoundly unwise. See generally, Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433, 436 (1986), in which, after a comprehensive study of pleading and practice under the Federal Rules, Professor Marcus rightly observed:

> [More specific pleading] does not provide a reliable method for determining whether a defendant has violated the plaintiff's rights because it requires the plaintiff to marshall evidence before conducting discovery. Neither can it be justified as a special way of handling certain 'specious' claims or a step toward discretionary dismissals. Instead, the preferable route is for probing plaintiff's factual conclusions should be to rely on more flexible use of summary judgment.

In short, "[t]he circumstances in which . . . merit decisions are possible on the pleadings . . . are distressingly limited." Id. at 493. It ought to be frankly recognized that this sort of throwback to fact pleading will make RICO litigation more complex, time consuming, and tend to resolve matters in a pro-defendants manner on an issue that does not go to the merits of the litigation. See Pound, Mechanical Jurisprudence, 8 Columb.

L. Rev. 123, 110 (1908) ("Every time a party goes out of court on a point of practice, substantive law suffers an injury.") ("Important as it . . . [is] that people should get justice, it . . . [is] even more important that they should be made to feel and see that they . . . [are] getting it.") (quoting Lord Herschell). If other appropriate reforms are made to RICO, this proposal may be safely struck from the bill. RICO plaintiffs, if they have meritorious claims, are victims of patterns of criminal conduct. No sound public policy reason can be offered for being pro-defendant in this sort of litigation at the pleading stage before the question of merit is fairly put in issue. Only the guilty will profit in the long run by such a policy.

12. Provision: Abatement and Survival

> (9)(A) An action or proceeding under this subsection shall not abate on the death of the plaintiff or defendant, but shall survive and be enforceable by and against his estate and by and against surviving plaintiffs or defendants.
>
> (B) An action or proceeding under this subsection shall survive and be enforceable against a receiver in bankruptcy but only to the extent of actual damages.

Analysis

This provision codifies the results, if not the rationales, of State Farm Fire and Casualty Co. v. Estate of Caton, 540 F.Supp. 673, 683-05 (N.D. Ind. 1982) and Summers v. F.D.I.C., 592 F.Supp. 1240, 1243 (W.D. Okla. 1984). It is a valuable provision.

13. Provision: Racketeer Label

> (10) In a civil action or proceeding under this subsection in which the complaint does not allege a crime of violence--
>
> "(A) the term 'racketeer' or the term 'organized crime' shall not be used by any party in any pleading or other written document submitted in the action, or in any argument, hearing, trial, or other oral presentations before the court; and
>
> "(B) the terms used to define conduct in violation of section 1962 of this title shall be referred to as follows:
>
> "(i) 'racketeering activity', as defined in section 1961(1) of this title, shall be referred to an 'unlawful activity'; and
>
> "(ii) 'pattern of racketeering activity', as defined in section 1961(5) of this title, shall be referred to as "pattern of unlawful activity.'

Analysis

Under the provisions of the proposed legislation, the use of the terms "racketeer" or "organized crime" in civil litigation would be restricted to proceedings in which a "crime of violence" was part of the pattern of unlawful behavior. In fact, the term "racketeer" is wholly appropriate to describe the sort of conduct RICO makes unlawful. See The American Heritage Dictionary of the English Language (Morris ed. 1970) ("'racket' . . . A business that obtains money through fraud or extortion . . . ."; M. Gurfein, Organized Crime in America 181-82 (G. Tyler ed. 1962) ("'Racketeering' . . . applies to the operation of an illegal business as well as to the illegal operation of a legal business . . . ."). See also United States v. Culbert, 435 U.S. 371, 375 (1978) ("[Racketeering]" . . . used loosely to designate . . . activity . . . questionable unmoral, fraudulent . . . whether criminal or not . . .") (quoting S. Rep. No. 1189, 75th Cong. 1st Sess. 2 (1937)). Nevertheless, it must be conceded that "racketeer" is a "fighting word." Chaplinsky v. New Hampshire, 315 U.S. 568, 574 ((1942) ("likely to provoke the average person to retaliation"). Its curtailment in civil litigation may well result in the settlement of litigation that would otherwise be unnecessarily prolonged. A Comprehensive Perspective on Civil and Criminal RICO Legislation and Litigation: A Report of the RICO Cases Committee 121-23 (ABA 1985) (contrary to popular misconception, experience shows that label inhibits, not facilitates, settlement). The provision may on balance do more good than harm.

14. Provision: Definitions

> "For purposes of subsection--
>
> "(A) the term 'governmental entity' means the United States or a State, and includes any department, agency, or government corporation of the United States or a State, or any political subdivision of a State which has the power (i) to levy taxes and spend funds, and (ii) to exercise general corporate and police powers;
>
> "(B) the term 'unit of general local government' means any political subdivision of a State which has the power (i) to levy taxes and spend funds, and (ii) to exercise general corporate and police powers; and
>
> "(C) the term 'crime of violence' means an offense involving--
>
> "(i) when chargeable under State law the following: murder, kidnapping, arson, robbery, or dealing in narcotic or other dangerous drugs;
>
> "(ii) when indictable under title 18, United States Code, and when accompanied by serious bodily injury the following: destruction of aircraft, or aircraft facilities as defined by section 32; arson as defined by section 81; acts against foreign officials and other persons as defined by section 112 (a), (c) through (f), acts against Federal officials and other

persons as defined by section 115; threats and extortion as defined by section 878; loansharking and other extortionate credit transactions as defined by section 891-894; homicide as defined by sections 1111-1112, 1114, 1116-1117; hostage taking as defined in section 1203; obstruction of justice as defined in sections 1501-1506, 1508-1513, and 1515; extortion as defined by section 1951; murder-for-hire as defined by section 1958; sexual exploitation of children as defined in sections 2251-2252 and 2256; explosives or dangerous weapons aboard vessels as defined in section 2277; terrorist acts abroad as defined in section 2331; or

"(iii) the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

Analysis

The interaction of these various definitions with the other provisions of the proposed legislation is analyzed under the various provisions.

15. Provision: International Service of Process

SEC. 5. INTERNATIONAL SERVICE OF PROCESS

Section 1965 of title 18, United States Code, is amended--

(1) in subsection (b) by striking "residing in any other district";

(2) in subsection (b) by striking "in any judicial district of the United States by the marshal thereof: and inserting "anywhere the party may be found";

(3) in subsection (c) by striking "in any other judicial district" and inserting "anywhere the witness is found";

(4) in subsection (c) by striking "in an district"; and

(5) in subsection (d) by striking "in any judicial district in which" and inserting "where".

Analysis

Currently, RICO provides for nationwide, but not international, service of process. See, e.g., Nordic Bank PLC v. Trend Group Ltd., 691 F.Supp. 542, 564-65, 569 n.30 (S.D.N.Y. 1985). Such service of process is essential to deal with criminal groups whose activities, often violent, extend across international boundaries. See generally Patterns of Global Terrorism 55-83 (U.S. Department of State 1989) (worldwide overview of organizations that engage in terrorism). It is provided for the securities statutes. See, e.g., SEC v. Kasser, 548 F.2d 109, 116 (2d Cir. 1977) ("United States must not be permitted to become a 'Barabary Coast' (for fraud)"), cert. denied, 431 U.S. 938 (1977).

It is probably unnecessary, but it might be wise to add to RICO language that expressly asserts extraterritorial jurisdiction for it. See, e.g., 18 U.S.C. § 1751(k).

16. Provision: Exclusive Jurisdiction

> SEC. 6. EXCLUSIVE FEDERAL JURISDICTION.
> Chapter 96 of title 18, United States Code, shall not be construed to confer jurisdiction to hear a criminal or civil proceeding or action under its provisions on a judicial or other forum of a State or local unit of government.

Analysis

Currently, the decisions are in conflict on the issue of exclusive or concurrent jurisdiction over Civil RICO. Compare Cianci v. Superior Court of Contra Costa County, 221 Cal. Rptr.

575, 710 P.2d 375 (1985) (concurrent) with Main Rusk Associates v. Interior Space Construction, Inc., 699 S.W.2d 305 (Tex. Ct. of App. 1985) (exclusive). The Supreme Court has granted certiorari in Tafflin v. Levitt, 865 F.2d 595 (4th Cir. 1989), cert. granted, 5 Civil RICO Report No. 2 at 4 (June 6, 1989) to resolve this conflict. A decision cannot be expected before well into the new year. The prosecution of Federal offenses is exclusive in the Federal courts. 18 U.S.C. § 3231. So, too, are actions dealing with forfeitures. 28 U.S.C. § 1355. The uniformity of the construction of Federal offenses would be best promoted by guaranteeing that it take place within a unitary system of justice. The countervailing consideration is that Federal judges are so hostile to any new litigation, but Civil RICO in particular, that it might receive better treatment in state courts. The proposed provisions are on balance probably a good idea. The attached alternative bills embody alternative provisions on jurisdiction.

17. Provision: Stylistic Amendment

SEC. 7. STYLISTIC AMENDMENT.

The analysis of chapter 96 of title 18, United States Code, is amended by striking out the item for section 1962 and inserting in lieu thereof the following:

"1962. Prohibited activities.".

Analysis

No analysis is required.

18. **Provision: Retroactively**

SEC. 8. JUDICIAL STANDARD TO DETERMINE REMEDY.

(a) IN GENERAL.--(1) Except as provided in paragraph (2) the amendments made by this Act shall apply to any civil action or proceeding commenced one day after the date of enactment of this Act.

(2) In any pending action under section 1964(c) of title 18, United States Code, in which a person would be eligible to recover only under paragraph (2)(A) of section 1964(c) as amended by this Act because the action does not meet the requirements of paragraph (2)(B) of section 1964(c), if this Act has been enacted before the commencement of that action, the recovery of that person shall be limited to the recovery provided under paragraph (2)(A), unless in the pending action--

(A) there has been a jury verdict or district court judgment, establishing the defendant's liability, or settlement has occurred; or

(B) the judge determines that, in light of all the circumstances, such limitation of recovery would be clearly unjust.

(b) EXCEPTION FOR COSTS OF CIVIL ACTION.--For purposes of this subsection, in any action in which a person would be eligible, by operation of subsection (a), to recover only under paragraph (2)(A) of section 1964(c) of title 18, as amended by this Act, the person shall also recover the cost of the civil action, which includes, in addition to a reasonable attorneys' fee, reasonable litigation expenses.

Analysis

Under the provisions of the proposed legislation, the reduction of treble to actual damages would be, in most cases, retroactive. The issue would be left for judicial resolution under a "clearly unjust" standard. Cost, including attorneys fee and litigation expenses, however, could still be recovered.

Approximately, 500 Civil RICO cases are pending as of March 31, 1989. Letter of Pamela D. Crawford, Civil Program Analyst, Administrative Office of the United States Courts of June 16, 1989, with enclosure to Professor G. Robert Blakey. Most of those cases have been filtered through a judicial process that is basically hostile to Civil RICO litigation. See Equitable Relief at 630 (51% of published opinions indicate dismissed post-Sedima; 40% dismissed on "pattern" ground). Most of the litigation that is still in the courts is in all likelihood, therefore, meritorious. The Supreme Court's unanimous decision in H.J. Inc. v. Northwestern Bell Telephone Co., 5 Civil RICO REport No. 5 (June 27, 1989) ought to have laid to rest any serious argument that the use of RICO outside of the organized crime area is beyond original Congressional intent or is somehow inherently abusive. The Court rightly observed:

> [The argument that RICO should be limited to organized crime] finds no support in the Acts text, and is at odds with the tenor of its legislative history. x x x Congress knew what it was doing when it adopted commodious language capable of extending beyond organized crime. x x x The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which . . . was not limited in application to organized crime. Id. at 5-6.

The effect of these provisions will be to give retroactive relief to defendants that hardly deserve it. The issue is not a matter of power, but wisdom. Congressman John Conyers put it well:

> The Constitution only prohibits without qualifications ex post facto criminal legislation. Nevertheless, not everything that is constitutional is wise. Justice Frankfurter--then a professor of law--put it well in 1925: "[P]reoccupation with the constitutionality of legislation rather than its wisdom * * * [is] a false value." (P. Kurland, Felix Frankfurter on the Supreme Court 177 (1970)). Making legislation retroactive--whatever its naked

> constitutionality--is, in the words of Justice Doe, one of the giants of American jurisprudence, in Kent v. Gray "irreconcilable with the spirit of our institutions." Justice Doe elaborated:
>
> > [I]t is most manifestly injurious, oppressive, and unjust, that, after an individual has, upon the faith of existing laws, brought his action * * * [that] the legislature should step in, and, without any examination of the circumstances of the cause, arbitrarily repeal the law upon which the action * * * has been rested. * * * [S]uch an exercise of power is irreconcilable * * * with the great principles of freedom upon which [our institutions] are founded * * * (53 N.H. 576, 580 (1873)).
>
> RICO, in short, did not make anything unlawful that was not already unlawful before its passage under its predicate offenses. No question is present here of a sudden or unexpected new liability. When Congress passed RICO, it held out to victims of sophisticated forms of crime the promise of treble damages to encourage the private enforcement of the law. Litigation was instituted in a trusting reliance on that promise. It is a promise that Congress ought not lightly break, particularly when the character of the conduct that it will insulate from its just desserts is noted: the principal beneficiaries of the retroactive elimination of the treble damage remedy will be the perpetrators of the recent bank and thrift fraud and Wall Street scandals. Can such a result, which protects the Butchers and Boeskys of the world, be justified in the clear light of day? 133 Cong. Rec. E 3353 (daily ed. August 7, 1987) (remarks of Cong. John Conyers).

Congress sits to legislate, not adjudicate. Cynics will believe that monies of defendants bought this legislation with political contributions. Americans do not play cards that way. Their elected representative ought not legislate that way.

Nothing that Congress does on Civil RICO reform ought to contribute to a further decline in the opinion that the American people hold of it.

IV. Independent Amendments

19. Amendment: Pattern

In H.J., Inc. v. Northwestern Bell Telephone Co., 5 Civil RICO Report No. 5 (June 27, 1989), the Supreme Court unanimously reversed the Eighth Circuit's multi-scheme test for "pattern." The Court recognized that the "pattern" concept played a key role in each of RICO substantive provisions, Section 1962(a) (b) and (c). Beginning with the ordinary meaning of the word, the Court paraphrased it as an "arrangement or order of things or activity." Id. at 3 (quoting 11 Oxford English Dictionary 357 (2d ed. 1989)). Turning to the legislation history of the statute, it concluded that Congress used "pattern" with a "fairly flexible concept of a pattern in mind." Id. at 4. The "order or arrangement" ought, the Court concluded, reflect "continuity [or its threat] plus relationship." Id. (quoting S. Rep. NO. 91-617, 1st Sess. 158 (1960)). The Court then recognized that continuity, a "temporal concept," meant a "substantial period of time," that is, more than a "few weeks or months." Id. at 5. A finding of its threat, too, was dependent "on the specific facts of each case." Id. The development of the concept would, the Court concluded, have to await "future cases, absent a decision by Congress to revisit RICO to provide clearer guidance . . . ."

Id.[12] The question is raised, therefore, should the Congress try its hand at making "pattern" more definite?

L. Wittgenstein, Philosophical Investigation 20 (2d ed. 1953) aptly observed: "For a large class of cases--though not for all--in which we employ the word 'meaning' it can be defined thus: the meaning of the word is its use in the language." (emphasis in original). Before an effort is made to draft a more concrete definition of "pattern," it is necessary to determine how it is used in the statute. As RICO is currently drafted, any definition of "pattern", too, must meet two tests:

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[12] Justice Scalia in his concurring opinion expressed considerable dissatisfaction with the majority's decision on the meaning of "pattern." In fact, he raised a question about "pattern's" possible unconstitutional vagueness. It is doubtful, however, that, after mature consideration, the full Court would hold the statute unconstitutional either on its face, or as applied, in at least its more aggravated applications. Compare Fort Wayne Books, Inc. v. Indiana, 109 S.Ct. 916 (1989) (Indiana RICO not unconstitutional as applied to obscenity) with United States v. Parness, 503 F.2d 430, 440-42 (2nd Cir. 1974) (not facially vague; person must fall within affected class to raise issue of vagueness as applied; not vague as applied). See also Nash v. United States, 229 U.S. 373, 376 (1913) (Holmes, J.) ("restraint of trade") ("[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimate it, some question of degree."); United States v. Petrillo, 332 U.S. 1, 7-8 (1947) (person in excess of "number of employees needed" held not vague); Morgan v. Bank of Waukegan, 804 F.2d 970, 976 (7th Cir. 1986) ("pattern . . . is a standard, not a rule . . . [which] depends on the facts"); II R. Pound, Jurisprudence 124-29 (1959) (standard and rule distinguished). Justice Scalia also cited FCC v. American Broadcasting Co., 347 U.S. 284, 296 (1954) for the proposition that a statute with criminal and civil sanctions must meet criminal standards of definiteness in its civil applications. FCC v. American Broadcasting Co., however, is of questionable authority today in light of Mourning v. Family Publication Service, 411 U.S. 356, 374-75 (1973) (FCC v. American Broadcasting Co. not followed; strict construction not applied, even through criminal and civil sanctions). Justice Scalia, too, seems to forget that a major source of the difficulty with "pattern" may not be semantical, but political. See L. Friedman, The Legal System 33 (1975) ("uncertainty [may] exist [. . .] not because but in spite of the text. What unsettles . . . rules is social controversy--challenge, social demand.") RICO may not be so hard to read as so hard to accept.

1. it must work in both criminal and civil litigation (§§ 1963, 1964), and
2. it must work in all sections of the statute (§ 1962(a) (b) and (c)).

Any definition of "pattern" will be crucial for such issues as the following--

1. definition of criminality (when an indictment may be returned),
2. statement of a claim for relief (when an action may be brought),
3. principle of issue or claim preclusion (when an element may be litigated or an action must be brought either criminally (double jeopardy) or civilly)),
4. application of statute of limitations (when, in whole or in part, it is too late to bring an action),
5. the scope of discovery before trial, and
6. the admissibility of evidence at trial.

Finally, careful attention must be given to the "setting" of the various uses of "pattern" in the statute. Holmes, The Theory of Legal Interpretation, 12 Harv. L.Rev. 417 (1898-99) ("You have to consider the sentence in which . . . [a word] stands to decide . . . meaning [. . .]"); Skelly Oil Co. v. Phillips Petroleum, 339 U.S. 667, 678 (1950) ("The same word in different setting, may not mean the same thing.")

Under RICO, "enterprise" includes four basic types of organizations. It includes commercial entities such as domestic and foreign corporations, partnerships, and sole proprietorships. It includes benevolent organizations such as unions, benefit funds, and cooperatives. It includes governmental entities such as the office of a governor or legislator, a court or a prosecutor and police and general governmental agencies. It also includes lawful and unlawful associations-in-fact.

Under RICO, "racketeering activity" includes five basic types of offenses. It includes violence, the provision of illegal goods and services, corruption in the labor movement, corruption among public officials, and commercial and other forms of criminal fraud.

RICO then makes unlawful four basic forms of these kinds of "racketeering activity" by, through, or against an "enterprise": (1) using proceeds (Section 1962(a)), (2) taking over (Section 1962(b)), (3) operating (Section 1962(c)) and conspiring to do so (Section 1962(d)).

Under RICO, the "enterprise" plays, therefore, four separate, but not necessarily mutually exclusive, roles: perpetrator, victim, instrument, or prize. See generally Blakey, The RICO Civil Fraud Act in Context, 58 Notre Dame L. Rev. 237, 290-325 (1982) (cited with approval in Haroco, Inc. v. American

Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 401 (7th Cir. 1984) ("helpful" analysis), aff'd. on other grounds, 473 U.S. 606 (1985); G. Dillon, Introduction to Contemporary Linguistic Semantics Ch. V at 68-82 (1977) (semantic role literature surveyed).

Accordingly, under RICO, "pattern" is used in its various violations in at least 240 different, but related contexts.[13] While the use in each context may be different, they reflect a "family of meanings." L. Wittgenstein, Philosophical Investigations 36 (2d ed. 1952) "[W]e see a complicated network of similarities overlapping and criss-crossing; sometimes overall similarities, sometimes similarities of detail." Id. at 32 ("family resemblances").

The complexity of the uses of the "pattern" concept is, however, substantially mitigated by the clarity of the definition of the predicate offenses. United States v. Stofsky, 409 F.Supp. 609, 612 (S.D.N.Y. 1973) (not vague since predicate offenses clearly defined), aff'd, 527 F.2d 237 (2d Cir.), cert. denied, 429 U.S. 819 (1976). Accordingly, the line between guilt and innocence under RICO is appropriately drawn at the point of the predicate offense. See McBoyle v. United States, 283 U.S. 25, 27 (1931) (Holmes, J.) ("not likely that a criminal will carefully consider the text of the law before he murders or steals, [but he ought to have] . . . fair warning . . . if a certain line is passed"). See generally, Goldsmith, RICO and "Pattern:" The Search For Continuity Plus Relationship, 73 Cornell L. Rev. 971 (1988); Note, Clarifying a Pattern of Confusion: A Multifactor Approach to Civil RICO's Pattern Requirement, 86 Mich. L. Rev. 1745 (1988); Note, Reconsideration of Pattern In Civil RICO Offenses, 62 Notre Dame L. Rev. 83 (1986).

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[13] 4 kinds of enterprises x 5 kinds of predicate offenses x 3 sections x 4 roles = 240.

As the Supreme Court recognized in H.J., Inc., the notion of "relationship" in "pattern" has not proven difficult to apply by the courts. Acts may be related among themselves or by reason of a connection to an enterprise. Compare United States v. Stofsky, 409 F.Supp. 609, 614 (S.D.N.Y. 1973) (common scheme), aff'd., 527 F.2d 237 (2d Cir. 1957), cert. denied, 429 U.S. 819 (1976) with United States v. Elliot, 571 F.2d 880, 899 (5th Cir.) (not to each other, but to enterprise), cert. denied, 439 U.S. 953 (1978).

The principal tension in the use of "pattern" comes from the concept of "continuity or its threat" and its contrasting uses in Section 1962(a) (use) and (c) (operation) and (b) (takeover). Emphasis on "continuity" in Section (a) and (c) may appropriately focus the statute so that it does not include a single episodes--the area of greatest alleged abuse in the commercial field--but it tends to read Section (b) out of the statute, if the word is given the same inflexible meaning in each section. *See* *United States v. Ianniello*, 808 F.2d 184, 191-93 (2d Cir. 1986) ("effective[ly] eliminate[s] this provision"); *Papul S. Mullin & Associates, Inc. v. Bassett*, 632 F.Supp. 532, 541 (D. Del. 1986) (would require multiple takeovers) In fact, some courts have wrongly moved in that direction. *See*, *e.g.*, *A.L. Williams Corp. v. Faircloth*, 652 F.Supp. 51, 55 (N.D. Ga. 1986). One way to break this tension is to eliminate the requirement of "pattern" in Section (b) for takeovers. It is not the provision most often used in the commercial fraud area; its elimination in Section (b) would pave the way for a more rigorous definition in Section (a) and (c), reflecting the Supreme Court's *H.J., Inc.* approach.[14]

Sound arguments can be made, on the other hand, that "pattern" ought not be further defined. Like the concept of "fraud" itself, it ought to be left flexible enough to fit a variety of situations. *See*, *e.g.*, *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir.) ("The law does not define fraud; it needs no definition; it is as old as falsehood and versatile as human ingenuity"), *cert. denied*, 314 U.S. 687 (1941); J. Story *Comments on Equity Jurisprudence* § 184 at 113. (1st English ed. 1884) ("It is not easy to give a definition of fraud . . .; and it has been said, that these courts . . . very wisely, never laid down, as a general proposition, what shall constitute fraud . . . lest . . . means of avoiding the equity of the courts should be found out.") Nevertheless, the consideration of the adoption of an amendment that would codify H.J., Inc. is recommended.

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[14] It would also make sense to eliminate the "collection of unlawful debt" language in Sections (a) and (c) and make the "collection of an unlawful debt" a "racketeering activity." This would tighten up those Sections even more.

Guidance here can be obtained by looking at RICO's sister provision, the Continuing Criminal Enterprise Statute (CCE). 22 U.S.C. § 848. See Garrett v. United States, 471 U.S. 773, 781 (1985) ("carefully crafted prohibition"); United States v. Valen Zuela, 596 F.2d 1361, 1366-67 (9th Cir.) ("continuing series" not vague) ("phrases [in CCE] cannot properly be considered in the abstract. They draw meaning both from each other and from the larger statutory context."), cert. denied, 444 U.S. 865 (1979). See also, United States v. Feola, 460 U.S. 671, 676 n.9 (1975) (jurisdiction only).

20. Amendment: Parens Patriae

Unlike the anti-trust statute, RICO does not provide for a parens patriae suits by state attorneys general. People of State of Illinois v. Life of Mid America Insurance Co., 805 F.2d 763, 767 (7th Cir. 1986). Such suits should be authorized. See Title III of the Hart-Scott-Rodino Anti-Trust Improvements Act of 1976, 90 Stat. 1394. Their authorization would strengthen the statute in its impact on both white-collar and organized crime. The experiences with state attorneys general and the anti-trust area demonstrates that such power will not be abused.

21. Amendment: Prejudgment Interest

Currently, the recovery of pre-judgment interest under RICO is in doubt. Compare, Abell v. Potomac Inc., Co., 858 F.2d 1104, 1142-43 (5th Cir. 1988) (yes, but only to compensate) with La. Power & Light Co. v. United Gas Pipe Line Co., 642 F.Supp. 781, 810-11 (E.D. La. 1986) (no). It is provided for under the anti-trust statutes. It should be added to RICO, particularly if recovery is reduced to actual damages. See Title III of the Hard-Scott-Rodino Anti-Trust Improvements Act of 1976, 90 Stat. 1394.

22. Amendment(s): Resolution or Clarification of Issues in Conflict

Any reform legislation should resolve or clarify crucial issues under RICO that are in conflict among the circuits. The legislation should include provision that would provide that--

1. an enterprise may be defendant, if perpetrator,
2. no financial motive is required,
3. associations-in-fact must be structured groups,
4. personal act rule is eliminated, and
5. state of mind is required.

First, the result of a line of cases that hold that, without regard to the circumstances, a person may not be an enterprise and a defendant in the same count of an indictment or complaint for criminal responsibility or civil liability should be set aside. The cases are collected in Bennett v. United States Trust Co. of New York, 770 F.2d 308, 314-15 (2d Cir. 1985), cert. denied, 106 S.Ct. 800 (1986). The proposition is rejected in United States v. Hartley, 678 F.2d 961, 988 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983). The rule reflects a technical reading of the language of Section 1962(c) that an enterprise cannot be "employed by or associated" with itself; it is also rooted in an unease at the prospect of holding an entity, which is an enterprise, liable, where it is the "victim" of the pattern of unlawful conduct engaged in by a person employed by or associated with it. Neither justification supports the rule. The issue is not technically whether or not the enterprise may be "employed by or associated" with itself, but whether or not the conduct of a person who is employed by or associated with the enterprise may be attributed to the enterprise under the usual rules of agency or respondeat superior. Those general rules, too, answer the other concern that underlies the rule. When the enterprise is the victim, the conduct of a person employed by or associated with it will not be attributed to it, for the person must not only act within the scope of his agency or employment, but also with intent to benefit his principal or employer. See, e.g., United States v. Cincotta, 689 F.2d 238, 241-43 (1st Cir.), cert. denied, 459 U.S. 991 (1982); United States v. Local 560, IBT, 581 F.Supp. 279, 332, n.30 337 (D.C. NJ 1984), aff'd., 780 F.2d 267, 284 (3d Cir.

1985), cert. denied, 106 S.Ct. 2247 (1986). See also, United States v. Spitler, 800 F.2d 1267, 1275-79 (4th Cir. 1986) (passive, but not active victim excluded from criminal liability under Gelbardi v. United States, 387 U.S. 112 (1933)). In addition, the rule threatens to frustrate the chief purpose of RICO--an attack on organized crime groups--when it is used to strike down indictments framed under a group enterprise theory. Compare United States v. Standard Drywall Corp., 617 F.Supp. 1283, 1292-94 (S.D.N.Y. 1985 (defendant cannot be one of a group constituting an enterprise) with Fustok v. Conticommodity Services, Inc., 618 F.Supp. 1074, 1075-76 (S.D.N.Y. 1985) (defendant can be one of a group constituting an enterprise). If the rule were applied to the association-in-fact theory in a prosecution of an organized crime family, it would abort the prosecution.

Second, the result of United States v. Ivic, 700 F.2d 51, 59-65 (2d Cir. 1983) (Croatian nationalist terrorists violence conviction under RICO reversed because no financial motive shown) should be set aside. While RICO was intended to attack the infiltration of legitimate business by organized crime, it was not limited to that purpose; it was designed to apply to any form of sophisticated criminal group engaging in specified kinds of activities, including violence, without regard to the motive of the perpetrators. Motive may be relevant, but no showing of a particular kind of motive ought to be required. Ivic effectively eliminates RICO's application to organized crime related violence not specifically tied to its money making endeavors; it also makes it application problematic to other violence based conspiracies, including international terrorists organizations and domestic anti-Semitic or white-hate groups.

Third, the result of the line of cases that permits the showing of an enterprise to consist of no more than the showing of a pattern of predicate offenses should be set aside. The showing of the existence of the enterprise ought to include a showing of a distinct structure beyond that merely required for the commission of the predicate offenses. Compare United States v. Bledsoe, 674 F.2d 647, 659-65 (8th Cir. ("distinct" structure), cert denied, 495 U.S. 1040 (1982); United States v. Riccobene, 708 F.2d 214, 223-24 (3d Cir.) (Bledsoe followed), cert. denied, 464 U.S. 849 (1983) with United States v. Mazzei, 700 F.2d 85, 87-90 (2d Cir.) (Bledsoe rejected), cert. denied, 461 U.S. 945 (1983); and United States v. Cagnina, 697 F.2d 915, 921 (11th Cir.) (Bledsoe rejected), cert. denied, 464 U.S. 856 (1983). Otherwise, the concept "enterprise"--a distinct element of the offense relating to the existence of an entity--would be reduced to a mere conspiracy or merged with the concept of a "pattern" of predicate offenses, which is a separate and distinct element of the offense relating to the commission of individual offenses. See United States v. Turkette, 452 U.S. 576, 583 (1981).

Fourth, the result of a line of cases that requires a showing that each person named as a defendant in an indictment or complaint commit, or agree to commit, personally the minimum number of acts required to constitute a pattern should be set aside. The rule originated in dictum in United States v. Elliot, 571 F.2d 880, 903 (5th Cir.), cert. denied, 439 U.S. 953 (1978), where it was a rule of evidence, that is, from the commission of the required number of acts an agreement could be inferred to commit them. In United States v. Martino, 648 F.2d 367, 394 (5th Cir. 1981), reversed on other grounds, 681 F.2d 952 (5th Cir. 1982), reversed and affirmed on other grounds, Russello v. United States, 464 U.S. 16 (1983), the rule of evidence was, however, treated as a rule of law: absent a showing of the personal commission of the required number of predicate offenses, or an agreement to commit them personally, responsibility could not be established under RICO. As such, the rule was then adopted in other circuits. United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981). It has been rejected by other circuits United States v. Adams, 759 F.2d 1099, 1115-16 (3d Cir.), cert. denied, 474 U.S. 906 (1985); United States v. Alonso, 740 F.2d 862, 870-72 (11th Cir. 1984), cert. denied, 105 S.Ct. 928 (1985); United States v. Title, 729 F.2d 615, 619-20 (4th Cir. 1984); United States v. Carter, 721 F.2d 1514, 1528-32 11th Cir. (19984). Ironically, it no longer represented the rule in the Fifth Circuit. United States v. Cauble, 706 F.2d 1322, 1339 (5th Cir.

1983), cert. denied, 104 S.Ct. 996 (1984). The rule should be set aside as inconsistent with traditional jurisprudence, which has long recognized aiding and abetting or conspiracy theories of responsibility without a requirement that the aider or abettor or the co-conspirator personally engaged in the substantive offenses. See, e.g., People v. Luciano, 277 N.Y. 348, 361, 14 N.E.2d 433, 446 (1938)(Luciano, a founder of organized crime, did not take an active part in the management of daily operation of a prostitution business, "but he cannot escape his criminal responsibility as the leader and principal"), cert. denied, 305 U.S. 620 (1938). Yet, under the personal act rule, a leader of an organized crime family, like a Luciano, who keeps his hands "clean"--merely directing others--would not be criminally or civilly responsible for a RICO conspiracy or for violating RICO substantively by aiding and abetting. That result is indefensible.

Fifth, the result of a line of cases that hold that RICO is a strict liability offense in regard to its RICO specific elements, that is, that no state of mind is required for a violation of RICO other than that required for the commission of the predicate offense, should be set aside. See, e.g., United States v. Scotto, 641 F.2d 47, 55-56 (2d Cir. 1980). These decisions have not commanded general acceptance. See, e.g., United States v. Bledsoe, 647 F.2d 647, 661 (8th Cir.) ("We express grave doubts as to the propriety of these holdings"), cert. denied, 459 U.S. 1040 (1982). The better reasoned approach is represented by United States v. Elliot, 571 F.2d 880, 906-07 (5th Cir.), cert. denied, 439 U.S. 953 (1978). The usual rules should obtain under RICO. State of mind is a question of legislative intent. United States v. Bailey, 444 U.S. 394, 402-09 (1980). It will generally be read into common law, but not regulatory offenses. Compare United States v. Balint, 258 U.S. 250, 251-52 (1922) (regulatory) with Morissette v. United States, 342 U.S. 246, 251 (1952) (common law). RICO is not a regulatory offense: it more analogous to a common law offense. As such, conduct should be held to be "knowing," while surrounding circumstances and results should be held to be "reckless." No state of mind should be required for elements that are of grading or jurisdictional significance only. United States v. Feola, 420 U.S. 671, 676 n.9 (1975). No persuasive reason can be offered for treating RICO as if it were not like other similar offenses requiring an appropriate showing of state of mind. Given its seriousness, it is anomalous to treat RICO as a strict liability offense.

23. Amendment: Sense of Congress Resolution

Any reform legislation should include a sense of Congress resolution that state and local units of government follow litigation policies similar to the Department of Justice. Currently, the Department of Justice follows a commendable policy of restraint in the use of RICO. State and local units of government should be encouraged to follow similar policies.

24. Amendment: Discovery and Finding in Arbitration

Currently, RICO claims for relief are subject to voluntary agreements to arbitrate. Shearson-American Express v. McMahon, 107 S.Ct. 2332 (1987). Any reform legislation should include provision for discovery and findings of fact in arbitration proceedings; they should also limit arbitration of crimes of violence and provide that arbitration agreements obtained through adhesion contracts are not enforceable. To make arbitrations effective, provision should be made for pre-arbitration discovery, so that just results may be obtained; and findings of fact, so that awards will have finality. See Cal. Civ. Proc. Code §§ 1282.6-1283.1 (West 1982) (discovery authorized in arbitration); C.D. Anderson & Co., Inc. v. Lemos, 832 F.2d 1097, 1100 (9th Cir. 1987) (preclusion between arbitration and court upheld). The incongruity of arbitration including crimes of violence ought to be eliminated and express provision made for the unenforceability of contracts of adhesion.

25. Amendment: Demonstration Related Litigation Abuse

Few can disagree that the aftermath of the Supreme Court's decision in Webster v. Reproductive Health Services No. 88-605 (July 3, 1989) promises continued controversy and public demonstrations involving those who support and oppose abortion.

Recently, too, the Third Circuit in Northwest Women's Center, Inc. v. McMonagle, 868 F.2d 1342, cert. pending, upheld the use of Civil RICO in the context of anti-abortion demonstrations at a clinic. The potential for litigation abuse, the impact of which may well be to chill pro-abortion or anti-abortion demonstrations, in this area is manifest. In fact, up to 30,000 individuals have been arrested throughout the nation in approximately 380 protests over the past year in connection with such demonstrations. N.Y. Times, June 21, 1989, p. B1, col. 1. If all of those individuals became embroiled in RICO litigation in the Federal courts (30 to a suit), it would increase the number of RICO cases by a factor three; the suits, too, would be complex conspiracy litigation. Such suits are being filed.[15] The danger of a chill on First Amendment rights and of litigation abuse in the administration of justice in the Federal courts is not, however, RICO-specific. The original claim for relief in Northwest Women's Center, Inc. included, for example, counts for anti-trust, trespass, intentional interference with contractual relation, intentional infliction of emotional distress, assault, battery, libel and slander. 868 F.2d at 1347. It is not even abortion-specific. Similar demonstrations take place, for example, in peace rallies, at nuclear facilities, and at research hospitals that use animals. The Supreme Court guidelines for civil litigation in the area of free speech are, of course, fairly specific. See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1981). The need is, therefore, for discovery and evidence limitations and provisions that make possible early vindication of litigant and lower court abuse in First Amendment litigation. RICO reform legislation provides an appropriate vehicle for making those general changes.

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[15] Town of Brookline, Massachusetts v. Operation Rescue, Inc., No. 89-0805-T (D. Mass. filed April 13, 1989 (suit by municipality under, inter alia, RICO, 18 U.S.C. § 1964(c), and the Hobbs Act, 18 U.S.C. § 1951, against prolife protesters to recover the costs incurred by the municipality to arrest protesters who participated in sit-ins at Brookline abortion clinics); Allegheny Women's Center v. Operation Rescue, No. 89-0792 (W.D. Pa. Filed April 10, 1989) (alleging RICO violation based upon allegation that picketing and sporadic blocking of doors, without any entry into clinic, constituted Hobbs Act extortion); Roe v. Operation Rescue, No. 88-5157 (E.D. Pa. filed June 29, 1988); National Organization for Women v. Scheidler, NO. 86 C 7888 (N.D. Ill., filed February 2, 1986) (alleging violation of RICO as a result of defendants' alleged conpiracy (sic) to steal the bodies of aborted babies from garbage disposals in the Chicago area and transport them across state lines for burial); North Highland Building Corp. v. Operation Rescue, No. 88-2121 (W.D. Pa. filed September 30, 1988) (suit by owner of building which leases space to abortion clinic alleging RICO violation based upon allegation that picketing and sporadic blocking of doors, without any entry into clinic, constitutes Hobbs Act extortion).

26. Amendment: Necessities and Forfeiture

In Caplin & Drysdale, Chartered v. United States and its companion decision United States v. Monsanto, 5 Civil RICO Report No. 5 at 3 (June 27, 1989), the Supreme Court held that assets subject to forfeiture under the Comprehensive Forfeiture Act of 1984, 98 Stat. 2044, include assets that were to be used to pay bona fide legal fees and that such a forfeiture was consistent with the Sixth Amendment right to counsel and Due Process under the Fifth Amendment. These decisions settle the constitutionality of such forfeitures. Their wisdom, however, remains a matter for congressional debate.

While few would argue with the proposition that a "robbery suspect . . . has no Sixth Amendment rights to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended," Caplin slip opinion at 8, the matter is, in fact far more complicated. See Blakey, Forfeiture of Legal Fees: Who Stands to Lose, 36 Emory L. J. 781 (1987); Note, Attorney Fee Forfeiture, 63 Notre Dame L. REv. 535 (1988).

Four situations may be broadly distinguished--

1. wholly innocent defendants (sufficient "clean" funds will probably be relatively easy to identify),
2. white-collar defendants, innocent or not (sufficient "clean" funds will probably be relatively easy to identify),
3. professional or organized crime defendants, innocent or not ("clean" funds, if any, may well be intertwined with "tainted" funds, an insufficient amount of which may be not more than 5 years old), and
4. indigent defendants, innocent or not (no funds of any kind)

Forfeiture issues are crucial only in the category of the professional or organized crime offender; they focus on the process of disentanglement and the ultimate proof of separation of "clean" and "tainted" assets. They are not limited to forfeiture of legal fees, but extend to all "necessities," that is, food, clothing, shelter, medical care, etc. The basic problem is that the possibility of such forfeitures threaten to render defendants in RICO and similar prosecutions "legally indigent" before trial and conviction.

Four interests may be distinguished--

1 victims of crime (not having "their" funds used to defend "perpetrators"),

2. suspects/defendants/offenders (having "their" funds used for fair trial, counsel, and other "necessities"),

3. third parties (having the ability to deal with those suspected or indicted in arms length transactions without fear of loss of consideration extended in good faith), and

4. society (each of these interests combined, but, just as importantly, an economically viable defense bar in complex criminal proceedings).

The reconciliation of these conflicting interests is not beyond the wit of fair minded people. A court ought to have the discretion to set aside a reasonable sum for necessities, except where an identifiable victim's property is at issue. "Untainted" funds ought to be used first. The government ought not to seek revenue enhancement, but merely to sterilize illicit funds. Otherwise, it ought to be viewed as a trustee of the funds for the benefit of innocent persons.

27. Amendment: Labor Disputes

A central purpose of RICO was the vindication of rights of victims of corruption in the labor-management area. See generally S. Rep. NO 91-617, 91st Cong., 1st Sess. at 78 (1969);

Blakey and Goldstock, On The Waterfront: RICO and Labor Racketeering 17 Am. Crim. L. Rev. 341 (1980). Numerous Criminal prosecutions have been brought against those involved in labor-management related offenses. See, e.g., United States v. Thordarson, 646 F.2d 1322 (9th Cir.) (RICO applicable to use of explosives in labor dispute). The Department of Justice, too, is beginning to use Civil RICO to free unions dominated by criminal groups. See, e.g., United States v. Local 560, 780 F.2d 267 (3d Cir. 1985), cert. denied, 106 S.Ct. 2247 (1986).

RICO was not designed, however, to be used as a negotiating tool in the standard sort of collective bargaining context. Nevertheless, litigation in this area is being wrongly instituted. Fortunately, district courts have acted to sanction its most abusive manifestations. See, e.g., WSB Electric Co. v. Rank & File Committee to Stop the 2-Gate System, 103 F.R.D. 417 (N.D. Cal. 1984) (Rule 11 sanctions applied to use of RICO in labor dispute). One of the least justifiable suits filed, for example, in this area is Texas Air. Corp. v. Air Line Pilots, Association International, Case No. 88-804 Civ. S.D. Fla. Little or no discretion was exercised in joining parties, even remotely related to the unions, now so deeply involved in the struggle, not yet settled, over the future of Eastern Airlines. A specific amendment that would make clear Congress' intent to leave the parties to resolve their disputes at the bargaining table would go a long way to restoring original Congressional intent. This form of litigation abuse needs to be curtailed.

V. Text of Amendments

1. Amendment: Title.

Page 1, line 4 immediately after "Reform" insert-- "Defendant's Protection and Swindler's Relief"

2. Amendment: Predicate Offenses

Page 2, line 1 through page 4, line 9 strike text and insert--

(A) by inserting "sections 1111-1117 (relating to homicide), section 1203 (relating to hostage taking)," after "gambling information),";

(B) by striking out "section 1503" and inserting "sections 1501-1506, 1508-1513, and 1515" in lieu thereof;

(C) by inserting "section 1992 (relating to wrecking trains), sections 2251-2252 and 2256 (relating to sexual exploitation of minors), section 227 (relating to vessels)," after "specified unlawful activity),";

(D) by inserting "section 2331 (relating to terrorists acts)," after "vehicle parts),";

(E) by inserting "32 (relating to destruction of aircraft or aircraft facilities), section 81 (relating to arson), section 112 (relating to protection of foreign officials and other persons), but not subsection (b), section 115 (relating to assaults and other acts against Federal and other persons), section" after ": Section";

(F) by inserting "section 373 (relating to solicitation to commit a crime of violence)," after "sports bribery),";

(G) by inserting "section 510 (relating to forging of Treasury or other securities), section 513 (relating to forgery of State and other securities)," after "counterfeiting),";

(H) by inserting "section 844 (relating to explosive materials), but not subsections (b), (c), or (g), section 875 (relating to interstate communications), but not subsection (d), section 876 (relating to mailing threatening communications), but not the fourth paragraph, section 877 (relating to threatening communications from foreign country), but not the fourth paragraph, section 878 (relating to threats and extortion)," after "pension and welfare funds),";

(I) by inserting "section 1029 (relating to fraud and other activity in connection with access devices), section 1030 (relating to fraud in connection with computers)," after "extortionate credit transactions),";

(J) by inserting "section 1344 (relating to bank fraud), but not the prohibition language of subsection (a)(2), section 1362 (relating to destruction of communication lines), section 1363 (relating to destruction of buildings), section 1364 (relating to obstruction of foreign commerce), section 1366 (relating to destruction of energy facility6)," after "(relating to wire fraud),";

(K) by inserting ", section 1952A (relating to murder for hire), section 1952B (relating to violent crime in aid of racketeering)," after "1952 (relating to racketeering)"; and

((L) by inserting "section 2318 (relating to trafficking in counterfeit labels and audiovisual works), section 2320 (relating trafficking in counterfeit goods and services)," after "of stolen property),";

(3) by striking out "or" at the end of subparagraph (D);

(4) by striking out the semicolon at the end of subparagraph (E) and inserting in lieu thereof ", (F) any offense under section 134 of the Truth in Lending Act (15 U.S.C. 1644), (G) any offense committed by a transporter under section 3008(e) of the Resource Conversation and Recovery Act of 1976 (42 U.S.C. 6928(e)) or a substantially similar knowing endangerment provision of a State hazardous waste program authorized by the Administrator of the Environmental Protection Agency under section 3006 of the Resource Conversation and Recovery Act of 1976 (42 U.S.C. 6926), but only if such transporter's conduct manifested an unjustified and inexcusable disregard for human life or an extreme indifference for human life, or (H) section 5861 of the Internal Revenue Code of 1986 (relating to firearm control) (26 U.S.C. 5861);" and

(5) in subparagraph (D), by striking out "fraud in the sale of securities," and inserting in lieu thereof "any offense under the Securities Act of 1933 (15 U.S.C. 77x), the Securities Exchange Act of 1934 (15 U.S.C. 77ff), the Public Utility Holding Company Act of 1935 (15 U.S.C. 79z-3), the Trust Indenture Act of 1939 (15 U.S.C. 77yyy), the Investment Company Act of 1940 (15 U.S.C. 80a-49 and 80b-17), or the Commodity Exchange Act (7 U.S.C. 13),".

3. Amendment: Burden of Proof (none)

4. Amendment(s): Government Suits

Page 4, line 15 through page 5, line 17 strike text and insert--

(c)(1)(A) A governmental entity injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court, a civil action therefore and, upon proof by a preponderance of the evidence, shall recover threefold the actual damages (not limited to competitive, direct or distinct injury) caused by such violation under circumstances where injury of that kind was reasonably foreseeable, and shall recover the cost of the civil action, including a reasonable attorney's fee.

(B) A civil action under subparagraph (A) of this paragraph must be brought by--

(i) the Attorney General, or other legal officer authorized to sue, if the injury is to a government entity of the United States;

(ii) the chief legal officer of a State, or other legal officer authorized to sue, if the injury is to the a government entity of the State;

(iii) the chief legal officer, or other legal officer authorized to sue, of a unit of local government of a State, a government corporation, or an Indian tribe or tribal organization, if the injury is the unit of local government, a government corporation, or an Indian tribe or tribal organization;

(iv) the court-appointed trustee or similar appointee of the court, if the injury is to an enterprise for which a trustee or similar appointee of the court has been appointed by a United States district court under section 1964(a) of this title; or

(v) the liquidator, rehabilitator or receiver of an insurance entity, including an insurance company, a hospital or medical or dental service plan, or a health maintenance organization, if the injury is to the liquidator, rehabilitator or receiver of an insurance entity or to an insurance entity."

5. Amendment: General Private Suits For Multiple Damages

Page 5, line 23 through page 7, line 24 strike text and insert--

"(A) the actual damages (not limited to competitive, direct or distinct injury) to the person's business or property caused by such violation under circumstances where injury of that kind was reasonably foreseeable, and the costs of the civil action, including a reasonable attorney's fee; and

(B) punitive damages (but not against a governmental entity) of up to twice the actual damages, if--

(I) the person whose business or property is injured is--

(i) a defense contractor (including a subcontractor or prospective contractor or subcontractor) meeting (or that would meet) the definition of defense contractor under section 702(f) of the Defense Production Act of 1950 (50 U.S.C. 2152(f));

(ii) an organization meeting the definition of exempt organizations under section 501(c) or (d) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c) or (d));

(iii) an organization meeting the definition of an indenture trustee under the Trust Indenture Act of 1939 (15 U.S.C. 77jjj);

(iv) an organization meeting the definition of a welfare plan, pension plan, or plan under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1), 2(A) or (3));

(v) an organization meeting the definition of an investment company under the Investment Company Act of 1940 (15 U.S.C. 80a-3(a));

(vi) an organization meeting the criteria for a small business concern under section 3 of the Small Business Act (15 U.S.C. 632(a));

(vii) a financial institution meeting the definition of financial institution under 31 U.S.C. § 5312(2)(A) (insured bank), (B) (commercial bank or trust company), (C) (private banker), (D) (agency or branch of a foreign bank), (E) (insured institution), (F) (thrift institution), (L) (operator of credit card system), (M) (insurance company), or (T) (agency of government), when such agency is acting for an institution within this subparagraph;

(viii) a federally chartered or insured financial institution meeting the definition of federally chartered or insured financial institution under 18 U.S.C. § 1344(b); or

(ix) the person whose business or property is injured is a natural person and the injury occurred in connection with a purchase or lease, for personal or noncommercial use or investment, of a product, service, investment, or other property, or a contract for personal or noncommercial use or investment, including a deposit in a bank, thrift, credit union or other savings institution; and

(II) the plaintiff proves that the defendant acted in willful disregard of the consequences of the defendants actions the plaintiff or another."

6. Amendment: Personal Injury Private Suits For Multiple Damages

Page 8, line 1 through 19 strike text and insert--

"(4) A person who suffers injury caused by conduct in violation of section 1962 of this title that includes a crime of violence as a predicate act under circumstances where injury of that kind was reasonably foreseeable may bring a civil action in an appropriate United States district court, and, upon proof by a preponderance of the evidence, shall recover threefold the actual damages (not limited to competitive, direct or distinct injury, but excluding pain and suffering, and limited to actual damages against a governmental entity) caused by such violation and, if the person substantially prevails, the costs of the civil action, including a reasonable attorney's fee."

7. Amendment: Limitations on Order of Proof

Page 8, line 20 through page 9 line 2 strike text

8. Amendment: Provision for Treble Damages For Injury to Business or Property After Criminal Conviction

Page 9, line 3 through line 18 strike text

9. Amendment: Statute of Limitations

Page 9, line 21 through page 10 line 3 strike text and insert--

"menced more than 5 years after the date of the cause of action accrues."

Page 9, line 20 strike "or (iii)" and insert--

"(iii), (iv) or (v)"

Page 10, line 1, strike "or criminal case"

10. Amendment: Affirmative Defense for Good Faith and Limitations on Discovery

Page 10, line 12 through line 24 strike text

11. Amendment: Pleading With Particularity

Page 11, line 1 through 3 strike text and insert--

"(8) In an action under this subsection, where a pleading, motion, or other paper includes an averment of fraud, coercion, agency, respondent superior, accomplice, or conspiratorial liability, it shall state, insofar as practicable, such circumstances with particularity."

12. Amendment: Abatement and Survival (none)

13. Amendment: Racketeer Label (none)

14. Amendment(s): Definitions

Page 12, line 4 through page 13, line 20 strike text and insert--

"(11) As used in this subsection, the term 'governmental entity' means the United States or a State, and includes any department, agency, or government corporation of the United States or a State, any political subdivision of a STate, any enterprise for which a trustee or similar appointee of the court has been appointed by a United States district court under section 1964(a) of this title (but only during the tenure of such trustee or similar appointee), a liquidator, rehabilitator or receiver of an insurance entity, including an insurance company, a hospital or medical or dental service plan, or a health maintenance organization, and an Indian tribe or tribal organization meeting the definition of Indiana tribe or tribal organization under section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450(b) and (c))."

15. Amendment: International Service of Process

Page 13, line 21 immediately after "Process" insert--

"AND JURISDICTION"

Page 13, line 22 before "Section" insert--

"(a)"

Page 14, between line 10 and line 11 insert--

"(b) Section 1962 of title 18, United States Code, is amended by adding at the end--

"(e) There is extraterritorial jurisdiction over the conduct prohibited by this section.""

16. Amendment: Exclusive Jurisdiction

Alternative versions appear in draft bills.

17. Amendment: Stylistic Amendment (none)

18. Amendment: Retroactivity

Page 14, line 20 through page 15, line 22 strike text.

VI. Caveat

If one or more of the above amendments are made, additional technical amendments will be necessary, that is, subsections will have to be renumbered, etc.

VII. Alternative Bills

Attached are two alternative bills that implement one or more of the amendments suggested in this memorandum

(1) Alternative A (retain basic design) (exclusive jurisdiction)

(2) Alternative B (adopt new design) (concurrent jurisdiction)

Alternative A
(retain basic design)

Draft of July 25, 1989

101th CONGRESS S. [ ]

1st SESSION

To amend chapter 96 of title 18, United States Code, relating to racketeer influenced and corrupt organizations, to restructure the civil claims procedures, and for other purposes.

IN THE SENATE OF THE UNITED STATES

July [ ], 1989

Mr. [ ] (for himself and [ ]) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend chapter 96 of title 18, United States Code, relating to racketeer influenced and corrupt organizations, to restructure the civil claims procedures, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

TITLE I - RICO REFORM

Section 101. SHORT TITLE.

This Act may be cited as the "Crime Control Act of 1989".

SEC. 102. PATTERN.

(a) Section 1961 of title 18, United States Code, is amended--

(1) by striking "or" after "States",

(2) by inserting after "Reporting Act"--

", or (f) the collection of an unlawful debt",

(3) by striking "(5)" through "racketeering activity" and inserting--

"(5) 'pattern of racketeering activity' means

(A) three or more acts of racketeering activity (excluding acts of jurisdictional significance only),

(B) the last act of racketeering activity occurred within five years of a prior act of racketeering activity,

(C) the acts of racketeering activity were related to each other or to the affairs of an enterprise,

(D) the acts of racketeering activity were part of a continuing series of acts of racketeering.

For the purpose of this paragraph (C), acts of racketeering activity are related if they have the same or similar purposes, results, participants, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated events.

For the purpose of paragraph (D), acts of racketeering activity are not part of a continuing series if the acts of racketeering activity are so closely related to each other and connected in point of time and place that the acts of racketeering constitute a single episode so that in reference to the manner of their commission, the purpose for which they were committed, the person who committed them, the enterprise in whose affairs they were committed, or otherwise, the acts of racketeering to not give rise to an inference of the possibility of continuing acts of racketeering activity.

(b) Section 1962 of title 18, United States Code is amended--

(1) in subsection (a) by striking "or through collection of an unlawful debt",

(2) in subsection (b) by striking "through a pattern of racketeering activity or through a collection of unlawful debt",

(3) in subsection (b) by inserting after "acquire"--

"through racketeering activity", and

(4) in subsection (b) by inserting after "maintain"--

"through a pattern of racketeering activity".

SEC. 103. BURDEN OF PROOF.

Section 1964(a) of title 18, United States Code, is amended by inserting after "of this chapter by issuing" the following: ", upon proof by a preponderance of the evidence,".

SEC. 104. CIVIL RECOVERY.

Subsection (c) of section 1964 of title 18, United States Code, is amended to read as follows:

"(c)(1)(A) A governmental entity injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court, a civil action therefore and, upon proof by a preponderance of the evidence, shall recover threefold the actual damages (not limited to competitive, direct or distinct injury) caused by such violation under circumstances where injury of that kind was reasonably foreseeable, and, if it substantially prevails, shall recover the cost of the civil action, including a reasonable attorney's fee.

"(B) A civil action under subparagraph (A) of this paragraph must be brought by--

"(i) the Attorney General, or other legal officer authorized to sue, if the injury is to a government entity of the United States;

"(ii) the chief legal officer of a State, or other legal officer authorized to sue, if the injury is to the a government entity of the State;

"(iii) the chief legal officer, or other legal officer authorized to sue, of a unit of local government of a State, a government corporation, or an Indian tribe or tribal organization, if the injury is the unit of local government, a government corporation, or an Indian tribe or tribal organization;

"(iv) the court-appointed trustee or similar appointee of the court, if the injury is to an enterprise for which a trustee or similar appointee of the court has been appointed by a United States district court under section 1964(a) of this title; or

"(v) the liquidator, rehabilitator or receiver of an insurance entity, including an insurance company, a hospital or medical or dental service plan, or a health maintenance organization, if the injury is to the liquidator, rehabilitator or receiver of an insurance entity or to an insurance entity.

"(2) A person whose business or property is injured by conduct in violation of section 1962 of this title may bring, in any appropriate United States district court, a civil action therefore and, upon proof by a preponderance of the evidence, shall recover--

"(A) the actual damages (not limited to competitive, direct or distinct injury) to the person's business or property caused by such violation under circumstances where injury of that kind was reasonably foreseeable, and, if the person substantially prevails, the costs of the civil action, including a reasonable attorney's fee; and

"(B) punitive damages (but not against a governmental entity) of up to twice the actual damages, if--

"(I) the person whose business or property is injured is--

"(i) a defense contractor (including a subcontractor or prospective contractor or subcontractor) meeting (or that would meet) the definition of defense contractor under section 702(f) of the Defense Production Act of 1950 (50 U.S.C. 2152(f));

"(ii) an organization meeting the definition of exempt organizations under section 501(c) or (d) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c) or (d));

"(iii) an organization meeting the definition of an indenture trustee under the Trust Indenture Act of 1939 (15 U.S.C. 77jjj);

"(iv) an organization meeting the definition of a welfare plan, pension plan, or plan under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1), 2(A) or (3));

"(v) an organization meeting the definition of an investment company under the Investment Company Act of 1940 (15 U.S.C. 80a-3(a));

"(vi) an organization meeting the criteria for a small business concern under section 3 of the Small Business Act (15 U.S.C. 632(a));

"(vii) a financial institution meeting the definition of financial institution under 31 U.S.C. § 5312(2)(A) (insured bank), (B) (commercial bank or trust company), (C) (private banker), (D) (agency or branch of a foreign bank), (E) (insured institution), (F) (thrift institution), (L) (operator of credit card system), (M) (insurance company), or (T) (agency of government), when such agency is acting for an institution within this subparagraph;

"(viii) a federally chartered or insured financial institution meeting the definition of federally chartered or insured financial institution under 18 U.S.C. § 1344(b); or

"(ix) the person whose business or property is injured is a natural person and the injury occurred in connection with a purchase or lease, for personal or noncommercial use or investment, of a product, service, investment, or other property, or a contract for personal or noncommercial use or investment, including a deposit in a bank, thrift, credit union or other savings institution; and

"(II) the plaintiff proves by clear and convincing evidence that the defendant acted in willful disregard of the consequences of the defendant's actions to the plaintiff or another.

"(3) A person who suffers injury caused by conduct in violation of section 1962 of this title that includes a crime of violence as a predicate act under circumstances where injury of that kind was reasonably foreseeable may bring a civil action in an appropriate United States district court, and, upon proof by a preponderance of the evidence, shall recover threefold the actual damages (not limited to competitive, direct or distinct injury, but excluding pain and suffering, and limited to actual damages against a governmental entity) caused by such violation and, if the person substantially prevails, the costs of the civil action, including a reasonable attorney's fee.

"(4)(A) The court may grant equitable relief in an action or proceeding brought under this subsection to a party with respect to a violation of section 1962 of this title in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other cases, including the possibility that any judgment for money damages might be difficult to execute (including secreting or dissipating assets or other similar conduct that might defeat a judgment for money damages), but no showing of special or irreparable injury shall have to be made.

"(B) Upon the execution, in the discretion of the court, of a proper bond against damages for an injunction improvidently granted, a temporary restraining order and a preliminary injunction may be issued in any action or proceeding under this subsection before a final determination of it upon its merits. Such undertaking shall not be required when the applicant is a governmental entity.

"(C) A recovery under this paragraph shall include the costs of the action or proceeding not otherwise provided for under this subsection, including a reasonable attorney's fee.

"(5)(A) Except as provided in subparagraph (B), a civil action or proceeding under this subsection may not be commenced more than five years after the date the cause of action accrues.

"(B) A civil action brought pursuant to subsection (c)(1)(B)(i), (ii), (iii) (iv) or (v) may not be commenced after more than six years after the date the cause of action accrues.

"(C) The period of limitation provided in subparagraphs (A) and (B) of this paragraph on a cause of action does not run during the pendency of a government civil action or proceeding or criminal case relating to the conduct upon which such cause of action is based or during the pendency of a labor dispute as provided in paragraph (13) of this subsection.

"(6)(A) Notwithstanding any other provision of law, any pleading, motion, or other paper filed by a person (excluding the Attorney General), in connection with an action or proceeding under this subsection shall be verified. Where the person is represented by an attorney, the pleading, motion, or other paper shall be signed by at least one attorney of record in his individual name, whose address shall be stated.

"(B) The verification by a person and the signature by an attorney required by this paragraph shall constitute a certification by the person or attorney that he has carefully read the pleading, motion, or other paper and, based on a reasonable inquiry, believes that--

"(i) it is well grounded in fact;

"(ii) it is warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law; and

"(iii) it is not made for any bad faith, vexatious, wanton, improper or oppressive reason, including to harass, to cause unnecessary delay, to impose a needless increase in the cost of litigation, or to force an unjust settlement through the serious character of the averment.

"(C) If a pleading, motion, or other paper is verified or signed in violation of the certification provisions of this paragraph, the court, upon motion or upon its own initiative, shall, after a hearing and appropriate findings of fact, impose upon the person who verified it or the attorney who signed it, or both, a fit and proper sanction.

"(D) Where a pleading, motion, or other paper filed in connection with an action or proceeding under this subsection includes an averment of fraud, coercion, agency, respondeat superior, accomplice, or conspiratorial liability, it shall state, insofar as practicable, the circumstances with particularity.

"(7) As used in this subsection, the term 'governmental entity' means the United States or a State, and includes any department, agency, or government corporation of the United States or a State, any political subdivision of a State, any enterprise for which a trustee or similar appointee of the court has been appointed by a United States district court under section 1964(a) of this title (but only during the tenure of such trustee or similar appointee), a liquidator, rehabilitator or receiver of an insurance entity, including an insurance company, a hospital or medical or dental service plan, or a health maintenance organization, and an Indian tribe or tribal organization meeting the definition of Indian tribe or tribal organization under section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 (b) and (c)).

"(8)(A) An action or proceeding under this subsection shall not abate on the death of the plaintiff or defendant, but shall survive and be enforceable by and against his estate and by and against surviving plaintiffs or defendants.

"(B) An action or proceeding under this subsection shall survive and be enforceable against a receiver in bankruptcy but only to the extent of actual damages or other relief.

"(9) In a civil action or proceeding under this subsection in which the complaint does not allege a crime of violence as a predicate act--

"(A) the term 'racketeer' or the term 'organized crime' shall not be used in referring to any party; and

"(B) the terms used to define conduct in violation of section 1962 of this title shall be referred to as follows:

"(i) 'racketeering activity' as defined in section 1961(1) of this title, shall be referred to as 'unlawful activity'; and

"(ii) 'pattern of racketeering activity', as defined in section 1961(5) of this title, shall be referred to as 'pattern of unlawful activity'.

"(10)(A) Any attorney general of a State may bring an action or proceeding under this subsection in the name of the State, as parens patriae, on behalf of individuals residing in the State, in an appropriate United States district court. The court shall exclude from the amount of monetary relief awarded in the action or proceeding any amount of monetary relief--

"(i) which duplicates amounts which have been awarded for the same claim; or

"(ii) which is properly allocable to individuals who have excluded their claims pursuant to this subsection and any business entity.

"(B)(i) In any action or proceeding brought under this paragraph, the State attorney general shall, at such times, in such manner, and with such content as the court may direct, cause notice of it to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person, the court may direct further notice to such person according to the circumstances of the case.

"(ii) Any individual on whose behalf an action or proceeding is brought under this paragraph may elect to exclude from adjudication the portion of the State claim for monetary or other relief attributable to him by filing notice of such time as specified in the notice given under this subsection.

"(iii) Any final judgment or decree in any action or proceeding under this paragraph shall preclude any separate issue or claim under this subsection by any individual on behalf of whom such action was brought and who fails to give such notice within the period specified in the notice given under this subsection.

"(C) Any action or proceeding under this paragraph shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs.

"(D) In any action or proceeding under this paragraph--

"(i) the amount of the plaintiffs' attorney's fee, if any, shall be determined by the court; and

"(ii) the court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the State attorney general has acted in bad faith, frivolously, vexatiously, wantonly, or for an improper or oppressive reason.

"(E) For purposes of this paragraph, the term 'state attorney general' means the chief legal officer of a State, or any other person authorized by State law to bring actions under this subsection (including the Corporation Counsel of the District of Columbia), except that such term does not include any person employed or retained on--

"(i) a contingency fee based on a percentage of the monetary relief awarded under this subsection; and "(ii) any other contingency fee basis, unless the amount of the award of a reasonable attorney's fee to a prevailing plaintiff is determined by the court under this subsection.

"(11)(A) The court may award under this subsection, upon the motion made after verdict, simple interest on actual damages for the period beginning on the date of service of the pleading setting forth a cause of action under this subsection and ending on the date of verdict, or for any shorter period, if the court finds that the award of interest for the period is just.

"(B) In determining whether an award of interest under this subsection for any period is just the court shall consider--

"(i) whether the opposing party, or either party's representative, filed pleadings, made motions, or filed other papers so lacking in merit as to show that such party or representative acted in bad faith, vexatiously, wantonly, or for an improper or oppressive reason;

"(ii) whether, in the course of the proceeding or action involved, the opposing party, or either party's representative, violated any applicable rule, statute or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings;

"(iii) whether the opposing party, or either party's representative engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost of the litigation; and

(iv) whether the award of such interest is necessary to compensate the opposing party for the injury sustained by him.

"(12) (A) A cause of action or proceeding under this section not based, in whole or in part, on a crime of violence as a predicate act shall be subject to the procedures of chapter 1 of title 9 (relating to arbitration).

"(B) No agreement to arbitrate any dispute that is an adhesion contract shall preclude the bringing of an action or proceeding under this section.

"(C) If the parties to a dispute under this section submit any dispute to arbitration, the arbitrator shall--

"(i) order on behalf of each party appropriate discovery from other parties or persons of the sort permitted in civil cases in Federal district courts, and

"(ii) render any award in writing with findings of fact and conclusions of law, if so requested by any party.

"(D) If any person fails to comply with discovery ordered under this paragraph, an interested person may in a civil action in the appropriate United States district court obtain enforcement of that order.

"(E) For the purpose of this paragraph, the term 'adhesion contract' means an agreement, standardized in form, over which one party does not have a meaningful opportunity to bargain either because its implications are not explicitly set out or because of the degree of disparity in the bargaining positions of the parties, or both.

"(13) (A) No action or proceeding may be brought under this subsection by a person in connection with and during a labor dispute.

"(B) For the purposes of this paragraph, the term 'labor dispute' means any labor dispute meeting the definition of a labor dispute under section 13(c) of the Anti-Injunction Act of 1932 (29 U.S.C. 113).".

SEC. 105. INCREASED PENALTIES FOR HOMICIDE.

Section 1963(a) of title 18, United States Code, is amended by striking "shall be fined under this title or imprisoned not more than twenty years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both" and inserting "shall be fined under this title and imprisoned for not more than twenty years, or for any term of years, or for life, if death results, or both".

SEC. 106. ADDITION OF PREDICATE OFFENSES.

Section 1961(1) of title 18, United States Code, is amended--

(1) in subparagraph (A), by inserting "prostitution involving minors," after "extortion,";

(2) in subparagraph (B)--

(A) by inserting "sections 1111-1117 (relating to homicide), section 1203 (relating to hostage taking)," after "gambling information),";

(B) by striking out "section 1503" and inserting "sections 1501-1506, 1508-1513, and 1515" in lieu thereof;

(C) by inserting "section 1992 (relating to wrecking trains), sections 2251-2252 and 2256 (relating to sexual exploitation of minors), section 2277 (relating to vessels)," after "specified unlawful activity),";

(D) by inserting "section 2331 (relating to terrorists acts)," after "vehicle parts),";

(E) by inserting "32 (relating to destruction of aircraft or aircraft facilities), section 81 (relating to arson), section 112 (relating to protection of foreign officials and others persons), but not subsection (b), section 115 (relating to assaults and other acts against Federal and other persons), section" after ": Section";

(F) by inserting "section 373 (relating to solicitation to commit a crime of violence)," after "sports bribery),";

(G) by inserting "section 510 (relating to forging of Treasury or other securities), section 513 (relating to forgery of State and other securities)," after "counterfeiting),";

(H) by inserting "section 844 (relating to explosive materials), but not subsections (b), (c), or (g), section 875 (relating to interstate communications), but not subsection (d), section 876 (relating to mailing threatening communications), but not the fourth paragraph, section 877 (relating to threatening communications from foreign country), but not the fourth paragraph, section 878 (relating to threats and extortion)," after "pension and welfare funds),";

(I) by inserting "section 1029 (relating to fraud and other activity in connection with access devices), section 1030 (relating to fraud in connection with computers)," after "extortionate credit transactions),";

(J) by inserting "section 1344 (relating to bank fraud), but not the prohibition language of subsection (a)(2), section 1362 (relating to destruction of communication lines), section 1363 (relating to destruction of buildings), section 1364 (relating to obstruction of foreign commerce), section 1366 (relating to destruction of energy facility)," after "(relating to wire fraud),";

(K) by inserting ",section 1952A (relating to murder for hire), section 1952B (relating to violent crime in aid of racketeering)," after "1952 (relating to racketeering)"; and

(L) by inserting "section 2318 (relating to trafficking in counterfeit labels and audiovisual works), section 2320 (relating to trafficking in counterfeit goods and services)," after "of stolen property),";

(3) by striking out "or" at the end of subparagraph (D);

(4) by striking out the semicolon at the end of subparagraph (E) and inserting in lieu thereof ", (F) any offense under section 134 of the Truth in Lending Act (15 U.S.C. 1644), (G) any offense committed by a transporter under section 3008(e) of the Resource Conversation and Recovery Act of 1976 (42 U.S.C. 6928(e)) or a substantially similar knowing endangerment provision of a State hazardous waste program authorized by the Administrator of the Environmental Protection Agency under section 3006 of the Resource Conversation and Recovery Act of 1976 (42 U.S.C. 6926), but only if such transporter's conduct manifested an unjustified end in excusable disregard for human life or an extreme indifference for human life, or (H) section 5861 of the Internal Revenue Code of 1986 (relating to firearm control) (26 U.S.C. 5861);" and

(5) in subparagraph (D), by striking out "fraud in the sale of securities," and inserting in lieu thereof "any offense under the Securities Act of 1933 (15 U.S.C. 77x), the Securities Exchange Act of 1934 (15 U.S.C. 77ff), the

Public Utility Holding Company Act of 1935 (15 U.S.C. 79z-3), the Trust Indenture Act of 1939 (15 U.S.C. 77yyy), the Investment Company Act of 1940 (15 U.S.C. 80a-49 and 80b-17), or the Commodity Exchange Act (7 U.S.C. 13),".

SEC. 107. VENUE AND PROCESS AND JURISDICTION.

(a) Section 1965 of title 18, United States Code, is amended--

(1) in subsection (b) by striking "residing in any other district";

(2) in subsection (b) by striking "in any judicial district of the United States by the marshal thereof." and inserting "anywhere the party may be found.";

(3) in subsection (c) by striking "in any other judicial district" and inserting "anywhere the witness is found";

(4) in subsection (c) by striking "in another district"; and

(5) in subsection (d) by striking "in any judicial district in which" and inserting "where".

(b) Section 1962 of title 18, United States Code, is amended by adding at the end--

"(e) There is extraterritorial jurisdiction over the conduct prohibited by this section."

SEC. 108. STATE JURISDICTION.

Chapter 96 of title 18, United States Code, shall not be construed to confer jurisdiction to hear a criminal or civil proceeding or action (except where the civil proceeding or action is brought by the chief legal officer of the State) under its provisions on a judicial or other forum of a State or local unit of government.

SEC. 109. CONSTRUCTION DIRECTIVES.

Chapter 96 of title 18, United States Code, shall not be construed--

(1) to prohibit a person from constituting an enterprise, or a part thereof, and a defendant in the same count of an indictment or a complaint;

(2) to require in a criminal or civil proceeding or action the showing of economically motivated conduct or a mercenary motive;

(3) to permit the showing of an enterprise by no more than a showing of a pattern of racketeering;

(4) to require a showing that each person named as a defendant in a criminal or civil proceeding or action commit, or agree to commit, personally the minimum number of acts required to constitute a pattern; or

(5) to permit a showing of criminal responsibility or civil liability without a showing of a state of mind other than that required for the offenses included in the pattern of racketeering.

SEC. 110. STYLISTIC AMENDMENT.

(a) Section 1962(d) of title 18, United States Code, is amended by striking out "subsections" and inserting in lieu thereof "subsection".

(b) The analysis of chapter 96 of title 18, United States Code, is amended by striking out the item for section 1962 and inserting in lieu thereof the following:

"1962. Prohibited activities.".

TITLE II - FORFEITURE REFORM

SEC. 201. FORFEITURE AND NECESSITIES.

(a) Part II - Criminal Procedure of title 18, United States Code, is amended by adding a new chapter immediately after Chapter 232A--

"Chapter 232B - FORFEITURE AND NECESSITIES

"Sec.

3685 Right to Reasonable Necessities.

"§ 3685 Right to Reasonable Necessities.

"(a) With respect to any property of a defendant or other person subject to a restraining order, an injunction, bond, or other action designed to assure its availability for forfeiture under any provision of law, the defendant or other person may petition the United States District Court or other judicial officer to set aside designated portions of the property for reasonable necessities.

"(b) The petition filed by the defendant or other person as provided in subsection (b) shall be accompanied by a showing under oath supporting the request for a set aside for reasonable necessities that establishes--

"(i) why property owned by the defendant or other person that is not subject to an order, injunction, bond, or other action is insufficient to maintain a reasonable lifestyle;

"(ii) the amounts needed by the defendant or other person to maintain a reasonable lifestyle; and

"(iii) the interest that any third party may have in property to be subject or subject to an order, injunction, bond, or other action that the defendant or other person seeks to have set aside for necessities.

"(c) Upon petition of a defendant or person, as provided in subsection (b), the United States District Court or other judicial office shall, after given notice to the United States and to any person appearing to have an interest in any property that the defendant or other person seeks to have set aside, grant a set aside if the court or officer determines by a preponderance of the evidence that the property subject to the set aside--

"(i) is needed by the defendant or other person for reasonable necessities; and

"(ii) may not be property unlawfully obtained from another person with rights of damages, restriction, or other relief.

"(d) Any hearing held under this section shall, at the request of any party, be held in camera.

"(e) No information presented by any person in support of a request for a set aside for reasonable necessities in a hearing held under this section (or any information directly or indirectly derived from such information) may be used against such person in any criminal case, except a prosecution for perjury or giving a false statement.

"(f) Any property set aside for reasonable necessities under this section that cannot be located upon the exercise of due diligence, is transferred or sold to or deposited with a third party, is placed beyond the jurisdiction of the court, is substantially diminished in value, or is combined with other property which cannot be divided without difficulty, but is subsequently forfeited under any provision of law shall be restored by the defendant or other person in an amount up to the value of such property and such amount shall be forfeited in substitution of such property.

"(g) For the purpose of this section, 'necessities' includes food, clothing, shelter, transportation, medical care, and professional fees.".

(b) The Table of Chapter Headings at the beginning of Part II - Criminal Procedure of Title 18, United States Code, is amended by inserting immediately after the entry for chapter 232A--

"232B - FORFEITURE AND NECESSITIES"

SEC. 202. THIRD PARTY RIGHTS.

(a)(1) Subsections (a), (b), (c), and (d) of section 24099a of title 28, United States Code, are amended to read--

"(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real personal or other property of any kind in which the United States claims an interest, including a criminal or civil forfeiture, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under section 1346, 1347, 1491, or 2410 of this title, section 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

"(b) The United States shall not be disturbed in possession or control of any real personal or other property of any kind involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real personal or other property of any kind or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

"(c) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real personal or other property of any kind or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

"(d) If the United States disclaims all interest in the real personal or other property of any kind or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.".

(2)(A) Section 2409a of title 28, United States Code, is amended by striking out the caption and inserting--

"§ 2409a. Property quiet title actions".

(B) The item relating to section 2409a in the chapter analysis of chapter 161 of title 28, United States Code, is amended to read--

"2409a. Property quiet title actions.".

(b) Subsection (p) of section 1346 of title 28, United States Code is amended by--

(1) inserting "personal or other" before "property"; and

(2) inserting "of any kind" between "property" and "in".

(c) Section 1347 of title 28, United States Code, is amended by inserting "or other property of any kind" between "lands" and "where".

SEC. 203. STATUTE OF LIMITATIONS.

Section 3282 of title 18, United States Code, is amended by

(1) inserting "(a)" before "Except", and

(2) adding at the end

"(b) No property may be criminally forfeited by reason of a violation of an offense unless an indictment is found or information is instituted within five years after the act giving rise to such forfeiture.".

TITLE II - DEMONSTRATION LITIGATION REFORM

SEC. 301. RESTRICTIONS ON DISCOVERY AND INTRODUCTION OF EVIDENCE AND APPEAL.

(a) Rule 26 of the Federal Rules of Civil Procedure is amended by adding at the end--

"(e) Discovery may not be obtained that interferes with the protected exercise of freedom of religion, speech, press, or peaceable assembly or petition of government for redress of grievance."

(b) Rule 403 of the Federal Rules of Evidence is amended by--

(1) inserting before "Although"--

"(a)", and

(2) adding at the end--

"(b) Evidence may not be admitted that interferes with the protected exercise of freedom of religion, speech, press, or peaceable assembly or petition of government for redress of grievance.".

(e) Section 1292(a) of title 28, United States Code is amended--

(1) by striking the "." at the end of paragraph (4) and inserting--

";", and

(2) by adding after paragraph (4)--

"(5) Interlocutory orders of the district courts of the United States granting or enforcing discovery or admitting evidence that interferes with the protected exercise of freedom of religion, speech, press, pr peaceable assembly or petition of government for redress of grievance."

TITLE II - GENERAL PROVISIONS

SEC. 301. SEPARABILITY.

If the provisions of any part of the Act, or the application thereof to any person or circumstances be held invalid, the provisions of the other parts and their application to other persons or circumstances shall not be affected there.

SEC. 302. EFFECTIVE DATE.

This Act shall be effective on enactment, but its provisions shall not apply to any criminal or civil action or proceeding instituted before its enactment.

Alternative B
(new design)

Draft of July 25, 1989

101th CONGRESS S. [ ]

1st SESSION

To amend chapter 96 of title 18, United States Code, relating to racketeer influenced and corrupt organizations, to restructure the civil claims procedures, and for other purposes.

IN THE SENATE OF THE UNITED STATES

July [ ], 1989

Mr. [ ] (for himself and [ ]) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend chapter 96 of title 18, United States Code, relating to racketeer influenced and corrupt organizations, to restructure the civil claims procedures, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

TITLE I - RICO REFORM

Section 101. SHORT TITLE.

This Act may be cited as the "Crime Control Act of 1989".

SEC. 102. FINDINGS.

Based on published data and its own studies, the Congress finds that--

(1) Organized crime, white-collar crime, violent group crime and other sophisticated forms of criminal conduct unlawfully inflict each year billions of dollars of damage on public and private institutions as well as individuals;

(2) Organized crime includes the importation and distribution of narcotics and other illicit drugs, loan sharking, syndicated gambling, theft and fencing, prostitution, bankruptcy fraud, counterfeiting, hazardous waste offenses, the infiltration of legitimate business and labor organizations, and political and other forms of public corruption;

(3) White-collar crime includes contract procurement fraud, credit card fraud, extortion, bribery, price-fixing, illicit market allocation, securities, commodities, and other frauds, tax fraud, medical fraud, bank and thrift fraud, arson for-profit and other forms of insurance fraud, product counterfeiting and diversion, coupon fraud, and home improvement fraud;

(4) Violent group crime includes murder, kidnapping, robbery, arson, gun-running, and explosive offenses, which are engaged in for a variety of motives, including individual pathology, economic profit, the desire to change governmental structures, and racial, religious and ethnic animosity, none of which is tolerable in a free society;

(5) Organized crime, white-collar crime, violent group crime and other sophisticated forms of criminal conduct are not mutually exclusive categories of criminal conduct;

(6) Federal, State and local law enforcement agencies have forged an increasingly effective partnership in efforts to curtail organized crime, white-collar crime, violent group crime, and other sophisticated forms of criminal conduct;

(7) The curtailment of organized crime, white-collar crime, violent group crime and other sophisticated forms of criminal conduct requires extraordinary techniques of investigation and prosecution, as well as special criminal and civil sanctions, which are not always available to State and local law enforcement agencies;

(8) The existence of an effective private enforcement mechanism is essential to any effort to curtail organized crime, white-collar crime, violent group crime, and other sophisticated forms of criminal conduct;

(9) Any private enforcement mechanism must be carefully tailored to maximize the advantage and to minimize the disadvantage to the interest of justice;

(10) Because of marketplace and other relative inequalities, a private enforcement mechanism, to be effective, must encourage enforcement, deter violators, and compensate victims for accumulative harm, including opportunity and transaction costs, by authorizing the recovery of multiple damages and litigation costs, including attorney's fees;

(11) To curtail litigation abuse in the administration of the private enforcement mechanism, the use of terms of opprobrium must be circumscribed, verification must be required in certain litigation, more particularity in pleading standards involving secondary liability must be enforced, and adjustments must be made to the provision for multiple damages; and

(12) Divergent court decisions require the clarification of original Congressional intent under Title IX of The Organized Crime Control Act of 1970 (18 U.S.C. 1961 *et seq.*).

SEC. 103. PATTERN.

(a) Section 1961 of title 18, United States Code, is amended--

(1) by striking "or" after "States",

(2) by inserting after "Reporting Act"--

", or (f) the collection of an unlawful debt",

(3) by striking "(5)" through "racketeering activity" and inserting--

"(5) 'pattern of racketeering activity' means

(A) three or more acts of racketeering activity (excluding acts of jurisdictional significance only),

(B) the last act of racketeering activity occurred within five years of a prior act of racketeering activity,

(C) the acts of racketeering activity were related to each other or to the affairs of an enterprise,

(D) the acts of racketeering activity were part of a continuing series of acts of racketeering.

For the purpose of this paragraph (C), acts of racketeering activity are related if they have the same or similar purposes, results, participants, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated events.

For the purpose of paragraph (D), acts of racketeering activity are not part of a continuing series if the acts of racketeering activity are so closely related to each other and connected in point of time and place that the acts of racketeering constitute a single episode so that in reference to the manner of their commission, the purpose for which they were committed, the person who committed them, the enterprise in whose affairs they were committed, or otherwise, the acts of racketeering to not give rise to an inference of the possibility of continuing acts of racketeering activity."

(b) Section 1962 of title 18, United States Code is amended--

(1) in subsection (a) by striking "or through collection of an unlawful debt",

(2) in subsection (b) by striking "through a pattern of racketeering activity or through a collection of unlawful debt",

(3) in subsection (b) by inserting after "acquire"--

"through racketeering activity", and

(4) in subsection (b) by inserting after "maintain"-- "through a pattern of racketeering activity".

SEC. 104. ADDITION OF PREDICATE OFFENSES.

Section 1961(1) of title 18, United States Code, is amended--

(1) in subparagraph (A), by inserting "prostitution involving minors," after "extortion,";

(2) in subparagraph (B)--

(A) by inserting "sections 1111-1117 (relating to homicide), section 1203 (relating to hostage taking)," after "gambling information),";

(B) by striking out "section 1503" and inserting "sections 1501-1506, 1508-1513, and 1515" in lieu thereof;

(C) by inserting "section 1992 (relating to wrecking trains), sections 2251-2252 and 2256 (relating to sexual exploitation of minors), section 227 (relating to vessels)," after "specified unlawful activity),";

(D) by inserting "section 2331 (relating to terrorists acts)," after "vehicle parts),";

(E) by inserting "32 (relating to destruction of aircraft or aircraft facilities), section 81 (relating to arson), section 112 (relating to protection of foreign officials and other persons), but not subsection (b), section 115 (relating to assaults and other acts against Federal and other persons), section" after ": Section";

(F) by inserting "section 373 (relating to solicitation to commit a crime of violence)," after "sports bribery),";

(G) by inserting "section 510 (relating to forging of Treasury or other securities), section 513 (relating to forgery of State and other securities)," after "counterfeiting),";

(H) by inserting "section 844 (relating to explosive materials), but not subsections (b), (c), or (g), section 875 (relating to interstate communications), but not subsection (d), section 876 (relating to mailing threatening communications), but not the fourth paragraph, section 877 (relating to threatening communications from foreign country), but not the fourth paragraph, section 878 (relating to threats and extortion)," after "pension and welfare funds),";

(I) by inserting "section 1029 (relating to fraud and other activity in connection with access devices), section 1030 (relating to fraud in connection with computers)," after "extortionate credit transactions),";

(J) by inserting "section 1344 (relating to bank fraud), but not the prohibition language of subsection (a)(2), section 1362 (relating to destruction of communication lines), section 1363 (relating to destruction of buildings), section 1364 (relating to obstruction of foreign commerce), section 1366 (relating to destruction of energy facility6)," after "(relating to wire fraud),";

(K) by inserting ", section 1952A (relating to murder for hire), section 1952B (relating to violent crime in aid of racketeering)," after "1952 (relating to racketeering)"; and

((L) by inserting "section 2318 (relating to trafficking in counterfeit labels and audiovisual works), section 2320 (relating trafficking in counterfeit goods and services)," after "of stolen property),";

(3) by striking out "or" at the end of subparagraph (D);

(4) by striking out the semicolon at the end of subparagraph (E) and inserting in lieu thereof ", (F) any offense under section 134 of the Truth in Lending Act (15 U.S.C. 1644), (G) any offense committed by a transporter under section 3008(e) of the Resource Conversation and Recovery Act of 1976 (42 U.S.C. 6928(e)) or a substantially similar knowing endangerment provision of a State hazardous waste program authorized by the Administrator of the Environmental Protection Agency under section 3006 of the

Resource Conversation and Recovery Act of 1976 (42 U.S.C. 6926), but only if such transporter's conduct manifested an unjustified and inexcusable disregard for human life or an extreme indifference for human life, or (H) section 5861 of the Internal Revenue Code of 1986 (relating to firearm control) (26 U.S.C. 5861);" and

(5) in subparagraph (D), by striking out "fraud in the sale of securities," and inserting in lieu thereof "any offense under the Securities Act of 1933 (15 U.S.C. 77x), the Securities Exchange Act of 1934 (15 U.S.C. 77ff), the Public Utility Holding Company Act of 1935 (15 U.S.C. 79z-3), the Trust Indenture Act of 1939 (15 U.S.C. 77yyy), the Investment Company Act of 1940 (15 U.S.C. 80a-49 and 80b-17), or the Commodity Exchange Act (7 U.S.C. 13),".

SEC. 105. CIVIL RECOVERY.

Section 1964 of title 18, United States Code, is amended to read as follows:

"§ 1964. Civil remedies

"(a) In any civil action or proceeding instituted under this section, the district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter, upon proof by a preponderance of evidence, by rendering an appropriate judgment or decree, including--

"(1) ordering any person to divest himself of any interest, direct or indirect, in any enterprise;

"(2) imposing reasonable restrictions on the future activities or investments of any person, including prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in or the activities of which affect interstate or foreign commerce;

"(3) ordering dissolution or reorganization of any enterprise, making the due provision for the rights of innocent persons; or

"(4) taking such other action as may be just.

"(b)(1) The Attorney General, or other legal officer authorized to sue if a department or agency of the United States is involved, may institute a proceeding under subsection (a) of this section.

"(2) Pending final determination of a proceeding instituted by the Attorney General or other legal officer under subsection (a) of this section, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as might be just.

"(c)(1) Any person may institute a proceeding under subsection (a) of this section.

"(2) In any proceeding brought by any person under subsection (a) of this section, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other cases, including the possibility that any judgment for money damages might be difficult to execute (including secreting and dissipating assets or other similar conduct that might defeat a judgment for money damages), but no showing of special or irreparable injury shall have to be made.

"(3) Upon the execution, in the discretion of the court, of a proper bond against damages for an injunction improvidently granted, a temporary restraining order and a preliminary injunction may be issued in any proceeding under subsection (a) of this section before a final determination of it upon its merits. Such undertaking shall not be required when the applicant is a State.

"(4) If the person who brings a proceeding under subsection (a) of this section substantially prevails, his recovery shall include the costs of the action, including a reasonable attorney's fee in the trial and appellate courts.

"(d)(1) Whenever the United States, or department or agency of the United States, is, directly or indirectly, injured in its business or property by a violation of section 1962 of this chapter, the Attorney General, or other legal officer authorized to sue, if a department or agency of the United States is involved, may bring a civil action in an appropriate United States district court and shall recover threefold the actual damages (but recovery against a State or an agency of a State shall be actual damages), upon a preponderance of evidence, caused by such violation under circumstances where injury of that kind was reasonably foreseeable, and if the United States, or department or agency of the United States, substantially prevails, the costs of the action, including the cost of investigation and litigation.

"(2) Except as provided in paragraph (3) of this subsection, any person, other than the United States or a department or agency of the United States, who is, directly or indirectly, injured by a violation of section 1962 of this chapter may bring a civil action in an appropriate United States district court and shall recover threefold the actual damages (but recovery against the United States, or a department or an agency of the United States, or a State, or department or an agency of a State, shall be actual damages), upon a preponderance of evidence, caused by such violation under circumstances where injury of that kind was reasonably foreseeable, and if the person substantially prevails, the costs of the action, including a reasonable attorney's fee in the trial and appellate courts.

"(3)(A) Any commercial entity that is, directly or indirectly, injured in its business or property by a commercial entity solely through fraud by a violation of section 1962 of this chapter may bring a civil action in an appropriate United States district court and shall, upon a preponderance of evidence, recover the actual damages caused by such violation under circumstances where injury of that kind was reasonably foreseeable, and if the commercial entity substantially prevails, the costs of the action, including a reasonable attorney's fee, and punitive damages of up to three times actual damages, if the defendant acted in willful disregard of the consequences of the defendant's action to the plaintiff or to another.

"(B) For the purposes of this paragraph--

"(i) 'commercial entity' means any business entity (other than an entity meeting the criteria for a small business concern under section 3 of the Small Business Act (15 U.S.C. § 632 (a)) engaged in commerce for profit; and

"(ii) 'fraud' means conduct in violation of section 1341 (relating to mail fraud) or section 1343 (relating to wire fraud) of this title.

"(4) It shall be an affirmative defense that precludes recovery of more than actual damages and costs, including a reasonable attorney's fee, to be established by the defendant, upon preponderance of the evidence, where responsibility rest on respondeat superior, that he did not authorize, request, commence, ratify, or recklessly tolerate the violation of another himself or by a high managerial agent or employee acting on his behalf and within the scope of his authority or employment.

(5) Damages recovered under this subsection shall not be limited to competitive or distinct injury.

"(e) If the court determines that the filing of any pleading, motion, or other paper under subsection (c) or (d)(2) or (3) of this section was frivolous or that any civil action or proceeding was brought or continued under subsection (c) or (d)(2) or (3) of this section in bad faith, vexatiously, wantonly, or for an improper or oppressive reason, it shall award a fit and proper sanction, including the costs of the civil action or proceeding (including the costs of investigation and a reasonable attorney's fee in the trial and appellate courts), unless the court finds that special circumstances, including the relative disparate economic position of the parties, make such an award unjust.

"(f) Upon the filing of a civil action or proceeding under subsection (c) or (d)(2) or (3) of this section, the person filing the action or proceeding shall immediately notify the Attorney General in such manner as the Attorney General shall direct by regulations. The Attorney General may, upon timely application, intervene in any civil action or proceeding brought under subsection (c) or (d)(2) or (3) of this section, if the proceeding is of general public importance. In such action or proceeding, the Attorney General shall be entitled to the same relief as if he had instituted the civil action or proceeding.

"(g)(1) Except as provided in paragraph (2) of this subsection, a civil action or proceeding under subsection (c) or (d)(2) or (3) of this section shall be barred unless it is commenced within five years after the unlawful conduct terminates or the cause of action otherwise accrues, whichever is later.

"(2) A civil action of proceeding brought by the Attorney General, or a legal officer authorized to sue of a department or an agency of the United States, a State, or a department or an agency of a State under subsection (d) of this section, shall be barred unless it is commenced within six years after the unlawful conduct terminates or the cause of action otherwise occurs, whichever is later.

"(3) Whenever any criminal action or civil action or proceeding is brought or intervened in by the Attorney General to punish, prevent, restrain, or sanction any violation of section 1962 of this chapter or during a labor dispute, the running of the period of limitations provided in this subsection with respect to any cause of action arising under subsection (c) or (d) of this section, which is based in whole or in part on any matter complained of in such action or proceeding by the Attorney General or related to the labor dispute shall be suspended during the pendency of such action or proceeding by the Attorney General or the labor dispute and for two years after the pendency of such action or proceeding.

"(h) (1) A civil cause of action or proceeding under this section not based, in whole or in part, on a crime of violence as a racketeering act shall be subject to the procedures of chapter 1 of title 9 (relating to arbitration) of the United States Code.

"(2) No agreement to arbitrate any dispute that is an adhesion contract shall preclude the bringing of a civil action or proceeding under this section.

"(3) If the parties to a dispute under this section submit any dispute to arbitration, the arbitrator shall-

"(A) order on behalf of each party appropriate discovery from other parties or persons of the sort permitted in civil actions or proceedings in district courts of the United States, and

"(B) render any award in writing with findings of fact and conclusions of law, if so requested by any party.

"(4) If any person fails to comply with discovery ordered under this subsection, an interested person may bring a civil action or proceeding in an appropriate United States district court and obtain enforcement of that order.

"(5) For the purpose of this subsection, 'adhesion contract' means an agreement, standardized in form, over which one party does not have a meaningful opportunity to bargain either because its implications are not explicitly set out or because of the degree of disparity in the bargaining positions of the parties, or both.

"(i)(1) No civil action or proceeding may be brought under subsection (c) or (d)(2) or (3) of this section by a person, if the elements of the pattern of racketeering activity involve primarily decedents estates or domestic relations.

"(2) No civil action or proceeding may be brought under subsection (c) or (d)(2) or (3) of this section by a person in connection with and during a labor dispute.

"(3) For the purposes of this subsection--

"(A) 'decedents estates' means wills, bank account trusts, testamentary trusts, revocable trusts that become irrevocable upon death of grantor, or intestate succession;

"(B) 'domestic relations' means divorce, separation, custody, support, or adoption; and

"(C) 'labor disputes' means any labor dispute meeting the definition of a labor dispute under section 13(c) of the Anti-Injunction Act of 1932 (29 U.S.C. 113).

"(j)(1) Notwithstanding any other provision of law, any complaint, counterclaim, or answer filed by a person in connection with a civil action or proceeding under subsection (c) or (d)(2) or (3) of this section shall be verified by at least one party or his attorney. Where the person is represented by an attorney, any pleading, motion, or other paper shall be signed by at least one attorney of record in his individual name, whose address shall be stated.

"(2) The verification by a person or his attorney and the signature by an attorney required by this subsection shall constitute a certification by the person or attorney that he has carefully read the pleading, motion, or other paper and, based on a reasonable inquiry, believes that--

"(A) it is well grounded in fact;

"(B) it is warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law; and

"(C) it is not made for any bad faith, vexatious, wanton, improper or oppressive reason, including to harass, to cause unnecessary delay, to impose a needless increase in the cost of litigation, or to force an unjust settlement through the serious character of the averment.

"(3) If a pleading, motion, or other paper is verified or signed in violation of the certification provisions of this subsection, the court, upon motion or upon its own initiative, shall, after a hearing and appropriate findings of fact, impose upon the person who verified it or the attorney who signed it, or both, a fit and proper sanction, including the costs of the proceeding under subsection (h) of this section, unless the court finds that special circumstances, including the relative disparate economic position of the parties, make such an award unjust.

"(4) Where such pleading, motion, or other paper includes an averment of fraud, coercion, agency, respondent superior, accomplice, or conspiratorial liability, it shall state, insofar as practicable, such circumstances with particularity.

(k)(1) Notwithstanding the provisions of subsection (i)(1) of this section, the attorney general of a State may bring a civil action or proceeding under subsection (c) or (d) of this section in the name of the State, as parens patriae, on behalf of individuals residing in the State, in an appropriate United States district court. The court shall exclude from the amount of monetary relief awarded in the action or proceeding any amount of monetary relief--

"(A) that duplicates amounts that have been awarded for the same claim; or

"(B) that is properly allocable to natural persons who have excluded their claims pursuant to this subsection and any commercial entity.

"(2)(A) In any civil action or proceeding brought under this subsection, the attorney general of a State shall, at such times, in such manner, and with such content as the court may direct, cause notice of it to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person, the court may direct further notice to such person according to the circumstances of the case.

"(B) Any person on whose behalf of action or proceeding is brought under this subsection may elect to exclude from adjudication the portion of the State claim for monetary or other relief attributable to him by filing notice of such time as specified in the notice given under this subsection.

"(C) Any final judgment or decree in any civil action or proceeding under this subsection shall preclude any issue or claim under subsection (c) of (d) of this section by any person on behalf of whom such action was brought and who fails to give such notice within the period specified in the notice given under this subsection.

"(3) Any civil action or proceeding under this subsection shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs.

"(4) In any civil action or proceeding under this subsection--

"(A) the amount of the plaintiffs' attorney's fee, if any, shall be determined by the court; and

"(B) the court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a find that the attorney general of the State has acted in bad faith, frivolously, vexatiously, wantonly, or for an improper or oppressive reason.

"(5) For purposes of this subsection, 'attorney general of a State' means the chief legal officer of a State, or any other person authorized by State law to bring actions under subsection (c) or (d)(2) of this section, including the Corporation Counsel of the District of Columbia, except that such term does not include any person employed or retained on--

"(A) a contingency fee based on a percentage of the monetary relief awarded under this subsection; and

"(B) any other contingency fee basis, unless the amount of the award of a reasonable attorney's fee to a prevailing plaintiff is determined by the court under this subsection.

"(1) A final judgment or decree rendered in favor of the United States in any criminal action or civil action or proceeding in favor of the United States or any plaintiff or a defendant in any civil action or proceeding shall preclude the plaintiff or defendant in any subsequent civil action or proceeding as to all issues or claims respecting which the judgment or decree would preclude an issue or claim between the parties to it.

"(m)(1) The court may award under this section, upon the motion made after verdict, simple interest on actual damages for the period beginning on the date of service of the pleading setting forth a cause of action under this section and ending on the date of verdict, or for any shorter period, if the court finds that the award of interest for the period is just.

"(2) In determining whether an award of interest under this section for any period is just, the court shall consider--

"(A) whether the opposing party, or either party's representative, filed pleadings, made motions, or filed other papers so lacking in merit as to show that such party or representative acted in bad faith, vexatiously, wantonly, or for an improper or oppressive reason;

"(B) whether, in the course of the proceeding or action involved, the opposing party, or either party's representative, violated any applicable rule, statute or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings;

"(C) whether the opposing party, or either party's representative engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost of the litigation; and

"(D) whether the award of such interest is necessary to compensate the opposing party for the injury sustained by him.

"(n)(1) A civil action or proceeding under this section shall not abate on the death of the plaintiff or defendant, but shall survive and be enforceable by and against his estate and by and against surviving plaintiffs or defendants.

"(2) A civil action or proceeding under this section shall survive and be enforceable against a receiver in bankruptcy, but only to the extent of actual damages or other relief."

"(3) In any civil action of proceeding under this subsection in which the pleading, motion, or other paper does not allege a crime of violence as a racketeering act--

"(A) 'racketeer' or 'organized crime' shall not be used in referring to any person; and

"(B) the terms used to refer to conduct in violation of section 1962 of this chapter shall be as follows:

"(i) 'racketeering activity' as defined in section 1961(1) of this chapter, shall be referred to as 'unlawful activity'; and

"(ii) 'pattern of racketeering activity', as defined in section 1961(5) of chapter, shall be referred to as 'pattern of unlawful activity'.

"(4)(A) Courts of the States shall have concurrent jurisdiction with district courts of the United States over civil actions or proceeding brought under this section.

"(5)(B) Notwithstanding any other provision of law, any civil action or proceeding brought in a State court under this subsection (except against the United States, or department or an agency of the United States, or an officer or employee of the United States or an agency of the United States) shall not be, in whole or in part, removed to a district court of the United States.".

SEC. 106. VENUE AND PROCESS AND JURISDICTION.

(a) Section 1965 of title 18, United States Code, is amended--

"(1) in subsection (b), by striking "residing in any other district";

"(2) in subsection (b), by striking "in any judicial district of the United States by the marshall thereof." and inserting "anywhere the party may be found.";

"(3) in subsection (c), by striking "in any other judicial district" and inserting "anywhere the witness is found";

"(4) in subsection (c), by striking "in another district"; and

"(5) in subsection (d), by striking "in any judicial district in which" and inserting "where".

(b) Section 1962 of title 18, United States Code, is amended by adding at the end--

"(e) There is extraterritorial jurisdiction over the conduct prohibited by this section."

SEC. 107. COSTS OF PROSECUTION AND INVESTIGATION.

Section 1918 of title 28, United States Code, is amended by adding at the end thereof the following new subsection;

"(c)(1) Upon conviction in a court of the United States for an offense in chapter 96 of title 18, the court may order the defendant pay the costs of investigation and prosecution. Amounts collected under the preceding sentence shall be covered into miscellaneous receipts of the Treasury.

"(2) For the purposes of this subsection, 'costs of investigation' includes--

"(A) attorney, investigator, and auditor salaries and expenses;

"(B) special contract costs and special purchases;

"(C) travel costs and witness fees; and

"(D) grand jury fees and other related costs of investigation.".

SEC. 108. SENSE OF CONGRESS.

It is the sense of the Congress that the National Association of Attorneys General form a State RICO Committee that will promulgate advisory guidelines on the use of section 1964 of title 18, United States Code, by State and local entities of government, including government corporations, that will seek to assure, among other relevant factors, that it--

(1) is used--

(A) with restraint;

(B) selectively;

(C) uniformly;

(D) only where necessary adequately to reflect or reach the nature and extent of the unlawful activity involved; and

(E) with due regard for the limited resources of the district courts of the United States and

(2) is not used--

(A) routinely; or

(B) to create a bargain tool where its use would otherwise be inappropriate.

SEC. 109. CONSTRUCTION DIRECTIVES.

Chapter 96 of title 19, United States Code, shall not be construed--

(1) to prohibit a person from constituting an enterprise, or a part thereof, and a defendant in the same count of an indictment or a complaint;

(2) to require in a criminal or civil action or proceeding the showing of economically motivated conduct or a mercenary motive;

(3) to permit the showing of an enterprise by no more than a showing of a pattern of racketeering activity;

(4) to require a showing that each person named as a defendant in a criminal or civil action or proceeding commit, or agree to commit, personally the minimum number racketeering acts required to constitute a pattern; or

(5) to permit a showing of criminal responsibility or civil liability without a showing of a state of mind other than that required for the racketeering acts included in the pattern of racketeering.

SEC. 110. CONFORMING AMENDMENT.

The analysis of chapter 96 of title 18, United States Code, is amended by striking out the item for section 1962 and inserting in lieu thereof the following:

"1962. Prohibited activities.".

TITLE II - FORFEITURE REFORM

SEC. 201. FORFEITURE AND NECESSITIES.

(a) Part II - Criminal Procedure of title 18, United States Code, is amended by adding a new chapter immediately after Chapter 232A--

"Chapter 232B - FORFEITURE AND NECESSITIES

"Sec.

3685 Right to Reasonable Necessities.

"§ 3685 Right to Reasonable Necessities.

"(a) With respect to any property of a defendant or other person subject to a restraining order, an injunction, bond, or other action designed to assure its availability for forfeiture under any provision of law, the defendant or other person may petition the United States District Court or other judicial officer to set aside designated portions of the property for reasonable necessities.

"(b) The petition filed by the defendant or other person as provided in subsection (b) shall be accompanied by a showing under oath supporting the request for a set aside for reasonable necessities that establishes--

"(i) why property owned by the defendant or other person that is not subject to an order, injunction, bond, or other action is insufficient to maintain a reasonable lifestyle;

"(ii) the amounts needed by the defendant or other person to maintain a reasonable lifestyle; and

"(iii) the interest that any third party may have in property to be subject or subject to an order, injunction, bond, or other action that the defendant or other person seeks to have set aside for necessities.

"(c) Upon petition of a defendant or person, as provided in subsection (b), the United States District Court or other judicial office shall, after given notice to the United States and to any person appearing to have an interest in any property that the defendant or other person seeks to have set aside, grant a set aside if the court or officer determines by a preponderance of the evidence that the property subject to the set aside--

"(i) is needed by the defendant or other person for reasonable necessities; and

"(ii) may not be property unlawfully obtained from another person with rights of damages, restriction, or other relief.

"(d) Any hearing held under this section shall, at the request of any party, be held in camera.

"(e) No information presented by any person in support of a request for a set aside for reasonable necessities in a hearing held under this section (or any information directly or indirectly derived from such information) may be used against such person in any criminal case, except a prosecution for perjury, or giving a false statement.

"(f) Any property set aside for reasonable necessities under this section that cannot be located upon the exercise of due diligence, is transferred or sold to or deposited with a third party, is placed beyond the jurisdiction of the court, is substantially diminished in value, or is combined with other property which cannot be divided without difficulty, but is subsequently forfeited under any provision of law shall be restored by the defendant or other person in an amount up to the value of such property and such amount shall be forfeited in substitution of such property.

"(g) For the purpose of this section, 'necessities' includes food, clothing, shelter, transportation, medical care, and professional fees.".

(b) The Table of Chapter Headings at the beginning of Part II - Criminal Procedure of Title 18, United States Code, is amended by inserting immediately after the entry for chapter 232A--

"232B - FORFEITURE AND NECESSITIES"

SEC. 202. THIRD PARTY RIGHTS.

(a)(1) Subsections (a), (b), (c), and (d) of section 24099a of title 28, United States Code, are amended to read--

"(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real personal or other property of any kind in which the United States claims an interest, including a criminal or civil forfeiture, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under section 1346, 1347, 1491, or 2410 of this title, section 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

"(b) The United States shall not be disturbed in possession or control of any real personal or other property of any kind involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real personal or other property of any kind or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

"(c) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real personal or other property of any kind or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

"(d) If the United States disclaims all interest in the real personal or other property of any kind or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.".

(2)(A) Section 2409a of title 28, United States Code, is amended by striking out the caption and inserting--

"§ 2409a. Property quiet title actions".

(B) The item relating to section 2409a in the chapter analysis of chapter 161 of title 28, United States Code, is amended to read--

"2409a. Property quiet title actions.".

(b) Subsection (p) of section 1346 of title 28, United States Code is amended by--

(1) inserting "personal or other" before "property"; and

(2) inserting "of any kind" between "property" and "in".

(c) Section 1347 of title 28, United States Code, is amended by inserting "or other property of any kind" between "lands" and "where".

SEC. 203. STATUTE OF LIMITATIONS.

Section 3282 of title 18, United States Code, is amended by

(1) inserting "(a)" before "Except", and

(2) adding at the end

"(b) No property may be criminally forfeited by reason of a violation of an offense unless an indictment is found or information is instituted within five years after the act giving rise to such forfeiture.".

TITLE II - DEMONSTRATION LITIGATION REFORM

SEC. 301. RESTRICTIONS ON DISCOVERY AND INTRODUCTION OF EVIDENCE AND APPEAL.

(a) Rule 26 of the Federal Rules of Civil Procedure is amended by adding at the end--

"(e) Discovery may not be obtained that interferes with the protected exercise of freedom of religion, speech, press, or peaceable assembly or petition of government for redress of grievance."

(b) Rule 403 of the Federal Rules of Evidence is amended by--

(1) inserting before "Although"--

"(a)", and

(2) adding at the end--

"(b) Evidence may not be admitted that interferes with the protected exercise of freedom of religion, speech, press, or peaceable assembly or petition of government for redress of grievance.".

(e) Section 1292(a) of title 28, United States Code is amended--

(1) by striking the "." at the end of paragraph (4) and inserting--

";", and

(2) by adding after paragraph (4)--

"(5) Interlocutory orders of the district courts of the United States granting or enforcing discovery or admitting evidence that interferes with the protected exercise of freedom of religion, speech, press, pr peaceable assembly or petition of government for redress of grievance.".

TITLE II - GENERAL PROVISIONS

SEC. 401. SEPARABILITY.

If the provisions of any part of the Act, or the application thereof to any person or circumstances be held invalid, the provisions of the other parts and their application to other persons or circumstances shall not be affected there.

SEC. 402. EFFECTIVE DATE.

This Act shall be effective on enactment, but its provisions shall not apply to any criminal or civil action or proceeding instituted before its enactment.

Senator DeConcini. Mr. Long.

STATEMENT OF JAMES LONG, COMMISSIONER OF INSURANCE, STATE OF NORTH CAROLINA, ON BEHALF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, WASHINGTON, DC

Mr. Long. Thank you very much, Mr. Chairman. I know the hour is late and probably the mind is weary at this point. It surely is with me. Mr. Chairman, I thought this subject was important enough that I flew back last night from Cincinnati where we were having our annual meeting for two reasons: No. 1, talk to you about the importance of RICO to insurance commissioners, and, No. 2, to get out of Cincinnati. [Laughter.]

It turns out the rains came with me, though.

Senator DeConcini. You obviously don't run for office in Cincinnati. [Laughter.]

Mr. Long. No, sir, I don't, but Congressman Gradison from Cincinnati has a summer home in my State and says he has voted for me twice now. Incidentally, Senator, like you and the members of this committee, I am elected in statewide elections, one of only 11 commissioners in this country who are elected.

If I could, with the Chairman's indulgence, not get into the academic debate with you, not get into the theoretical debate with you, but talk to you about pure, raw politics. I can understand that, Senator.

Senator DeConcini. So can I.

Mr. Long. I thought you could.

Let me tell you the concerns that we as insurance commissioners in representing the National Association of Insurance Commissioners have with Senate 438. One is the retroactivity feature you have heard about—the loss of the ability to bring treble damages in litigation. Second is the affirmative defense. It delays a case, it makes a lot of work and employs a lot of lawyers. I do enough of that now, Senator, and I think there are adequate protections in the current law.

There is also language in Senate 438, as there is in the House bill pending before the Committee, which would say that only the chief legal officer of the State—that is, the attorney general—can bring the action. Senator, that is not the way it works in a rehabilitation or liquidation for an insurance commissioner. I, as insurance commissioner, step into that case as the alter ego of the company, as Director Gallagher would in your State in the event of a liquidation.

We also think, quite frankly, Mr. Chairman, it is a change in rules. We think it would be a gift from Congress to the thieves, the thieves that are in the marketplace of insurance fraud, and we are extremely concerned about that. If you allow us to recover only actual damages, Senator, that only becomes a cost of doing business. Only with the feature of treble damages can we stop some of this fraudulent activity.

With the Chair's indulgence—I will probably get sued on this one, too, Mr. Chairman—let me just quickly go through the effects that we have had in North Carolina with an insurance company known as the Beacon Insurance Co., which went into rehabilitation in State court action in February of 1984.

We took down six insurance companies around the world because of this fraud. In the State of Alabama, for example, where there is no guaranty fund mechanism, there currently are $406,500 in claims pending that cannot be recovered by the citizens of that great State; the State of Illinois, $38,792,000 in pending claims, no guaranty fund. We had insured the entire University of Illinois system for liability coverage and didn't even know it because of this fraud. That litigation, thank goodness, has finally been settled for $4.39 million.

The State of Iowa—you notice, quite frankly, Mr. Chairman, I picked the States that are represented on the Judiciary Committee. We can furnish this for the rest of the Senate, too.

The State of Iowa—we weren't even licensed to write in that State—pending claims, no guaranty funds, $1,833—not much, but there is an unhappy constituent of Senator Grassley out there who may need to write him on this one.

Ohio, no guaranty fund; pending claims unpaid, $4,831,721. Pennsylvania, no guaranty fund, $311,250 pending claims. South Carolina, my neighboring State to the south, a guaranty fund which will pay claims up to $300,000; pending claims, $1,519,067.

Senator Thurmond should hear this. We insured 19 amusement rides along the Myrtle Beach area, a real resort area. One of those had a $947,000 judgment against it. The guaranty fund in South Carolina paid the first $300,000. The decedent's estate is still out over $650,000.

Utah, no guaranty fund; $17,057 pending claims. Wisconsin, no guaranty fund; $41,714. I left off a State—Arizona. Senator, you were lucky. We had no claims out of your great State.

But you, I am sure, are familiar with Pine Tops, owned by the Greyhound Corp. Senator, if you will go back and review the litigation in Pine Tops. you will find the same defendants as in my case. It was that interwoven.

I may or may not be protected by testimony before Congress. I have already been sued 2 months ago for $2 million, so I guess this is no big deal anymore. Same defendants—Alexander Hougton, Peter J. Sharman, B.F.G. Toomey Associates. These were operating an international fraud scheme, Senator.

The complaint in that case ran 75 pages. It read like the outline for a good soap opera. We have been in litigation for 2½ years. We spend $125,000 every month just on the discovery process. Hopefully, we will be in trial within the next 10 months. That $75 million—if we can recover that, we can pay back those policyholders in these States I have listed and all the others and make those claimants whole.

Thank you, sir.

Senator DECONCINI. Mr. Long, thank you very much. Your perspective is important to us because you represent a kind of unique situation where you come in on bankruptcies or problem cases.

Is it true, however, that many well-run and respected insurance companies have been the subject of abusive RICO suits and, as a result, have become leading advocates of responsible RICO reform?

Mr. LONG. No.

Senator DECONCINI. No? You would say State Farm is not a respected insurance company?

Mr. LONG. No, sir. My comment in my response to you, Senator, was whether or not the respectable insurance companies had been defendants in frivolous RICO actions. My answer to that is no.

Senator DECONCINI. No?

Mr. LONG. I think if you look at those—and I agree, State Farm, a member of this coalition, and I have had some severe words with them about it, is a responsible insurance company. That, as I understand it, comes out of some litigation in Georgia several years ago, which was a change in the laws in Georgia which dealt with the issue of subrogation in auto claims.

Whether or not that should have been a RICO action, I don't know. They did not pay treble damages in that case; no one else did. And the only other case——

Senator DECONCINI. Well, if I——

Mr. LONG. I am sorry, sir.

Senator DECONCINI. If I submit a list of what I consider respected insurance companies—you may differ—that have been the subject of RICO cases, would you give me your opinion on whether or not you think that those are respected insurance companies?

Mr. LONG. I would be more than pleased to, Senator.

The only other case against an insurance company that has been cited to me directly, I believe, was the Prudential, and that turned out to be a mortgage loan situation, as I have understood the facts from them.

In large, Senator, the insurance industry is very responsible, very responsible.

Senator DECONCINI. I agree.

Mr. LONG. I am pleased to tell you, on the so-called business coalition, one of the insurance trade groups, the PIA, has now withdrawn from that.

Senator DECONCINI. But it is also true that there are a number of, quote, "well respected insurance companies," in your opinion, that are part of that coalition that are asking for some reform?

Mr. LONG. Senator, the State Farm Insurance Co. is still in the coalition. The ACLI is still in the coalition.

Senator DECONCINI. Are those respected insurance companies, in your opinion?

Mr. LONG. Well, ACLI is a trade group, of course, as is the Alliance. Hopefully, some time this afternoon the ACLI will drop out. I am putting the pressure on them, as I have the Alliance.

Senator DECONCINI. What kind of pressure are you putting on them, Mr. Long? [Laughter.]

Mr. LONG. The fact that we are actually saving their companies money because they don't take it here from the guarantee fund assessments, and I have asked the insurance industry to get very strongly behind us on the portion of the law or the changes in the law that we feel like we need to continue.

Senator DECONCINI. And if they don't withdraw from the coalition in support of this legislation, what are you going to do to them?

Mr. LONG. Keep lambasting them publicly, as we have to do in public office, Senator. I am certainly not going to sue them on a RICO action. [Laughter.]

Senator DECONCINI. You say you would not bring a RICO case against them?

Mr. LONG. No, sir, and the practical effect of this, Senator, is, in our Beacon case alone we spent $2.5 million. That is money that can be used to pay the policyholder claims, but we felt like it was worth it. We didn't, for example, sue the CPA's involved in it. They couldn't have detected the fraud because it was all off the books.

Senator DECONCINI. Do you agree that there is any need at all for RICO reform?

Mr. LONG. Yes, sir.

Senator DECONCINI. You do, but this particular area that you are talking about should be, in your opinion, excluded from any RICO reform?

Mr. LONG. It would depend on your definition of reform. I would ask the Senate to not change the game rules for us as insurance commissioners. There are probably 11 or 12 of these cases pending where your insurance commissioners brought them. There certainly has not been abuse of the process on our standpoint because it is incredibly expensive and incredibly time consuming to bring one of these cases.

Senator DECONCINI. What about outside your area? Are you familiar with any other RICO cases that you think are abusive or at least questionable? What about the bank case that was brought to us by the American Bankers today—those two cases? Were you here to listen to that?

Mr. LONG. I heard a portion of the testimony, Senator. I have a rule of thumb. If I ain't got a dog in that fight, I don't get into it, so I don't know. I am sure there are some abuses in the process, no question about that. But as far as details, I don't know.

Senator DECONCINI. Thank you, Mr. Long.

[The prepared statement of Mr. Long and response to questions follow:]

TESTIMONY

OF THE

NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

ON

S. 438, THE "RICO REFORM ACT OF 1989"

BEFORE THE

UNITED STATES SENATE JUDICIARY COMMITTEE

Honorable James Long
Commissioner of Insurance
State of North Carolina
June 7, 1989

ONE PAGE STATEMENT OF
JIM LONG, COMMISSIONER OF INSURANCE
STATE OF NORTH CAROLINA
NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

The National Association of Insurance Commissioners (NAIC) opposes S. 438, the Bill to amend the Federal Racketeer Influenced and Corrupt Organizations statute. RICO has proven to be an effective tool for state insurance regulators to use in their battle against insurance fraud. RICO is probably the single most effective deterrent which presently exists against national and international consipiracies to evade oversight by insurance regulators. NAIC opposes S. 438 for the following reasons:

I. S. 438 Affects Pending RICO Cases Retroactively.

There are RICO actions pending in nine states that were initiated by state insurance departments. S. 438 would adversely affect these pending actions retroactively. That is, the rules of the game would be changed by S. 438 mid-stream. This is unfair in most instances. But in this instance, we are talking about interfering with lawsuits brought on behalf of state regulators against those who are alleged to have committed insurance fraud upon the public. To consider decreasing the law enforcement tools available to state insurance regulators is outrageous.

II. S. 438 Excludes State Insurance Liquidators, Rehabilitators, and Receivers From Those Allowed to Sue as Government Entities.

The NAIC believes that state insurance departments ought to be included as governmental entities authorized to sue for automatic treble damages. S. 438 excludes the states because of the way government entities are defined. When the states sue under RICO, they sue for damages to the insolvent insurance company and not for damages to the state itself.

III. S. 438 Codifies A Special Defense For Special Interests.

The NAIC believes that the section of the bill creating an affirmative defense for those named in RICO suits is nothing short of special treatment for special interests -- and in this case -- the special interest is the insurance industry. This vague provision sets up a defense already permitted under current law. Its purpose is to frustrate and delay RICO lawsuits, and to intimidate state insurance departments to remain silent rather than blow the whistle on insurance fraud.

WRITTEN TESTIMONY

Gentlemen, I am most appreciative to you, both as a personal privilege and in my capacity as the representative of the National Association of Insurance Commissioners (NAIC), to have the opportunity to present to you this morning some of the concerns and comments of my fellow insurance commissioners about S. 438 and other pending bills to change the present status of the Federal Racketeer Influenced and Corrupt Organizations' Statute.

The NAIC, like several of the organizations you have heard from or will hear from today, is an organization of government officials, in this case, insurance commissioners of the 50 states, who have the affirmative duty of protecting the interest of the public and enforcing the various insurance laws in this country. The NAIC and its individual commissioners are the initial line of defense separating the American citizen from illegal and fraudulent insurance-related crimes. It is in this role as a defender of citizens that my fellow insurance commissioners and I would like to make the following points to you today.

Congress is considering amendments to Title IX of the Organized Crime Control Act of 1970. This Title, which is known as the Racketeer Influenced and Corrupt Organizations statute ("RICO") contains a provision which allows a person, firm or other entity which has been damaged by a pattern of illegal activities to file a civil suit in an appropriate United States District Court and to receive, if a jury verdict is entered in the plaintiff's favor, an award of treble damages against the defendants.

RICO has proven to be an effective tool to state insurance regulators in their battle against insurance fraud and is probably the single most effective deterrent which presently exists against national and international conspiracies to evade oversight by insurance regulators and to defraud consumers of insurance products.

Not everyone is happy with the effectiveness of RICO, and not every plaintiff has chosen to exercise discretion before filing a case under the law. For these reasons there are proposals to amend the existing provisions of the law. The most recent version of these proposed changes occurs in S. 438. While many of the changes proposed in this draft legislation are beneficial, there are several sections which would seriously hamper legitimate efforts by state insurance regulators to punish insurance fraud and to insure that insolvent insurance companies meet the claims of their creditors and policyholders.

State insurance regulators are in the midst of a period that has experienced the greatest number of insolvent insurance carriers ever in the history of the industry. One hundred and sixty (160) insurance companies world-wide are presently in some form of liquidation/rehabilitation with at least a third of those companies experiencing difficulty recently. Insurance fraud is an element in almost every insurance failure; a minor element in some failures; the exclusive reason for failure in others. There is a crisis in the industry revolving around insolvent insurers and insurance crime is a major cause of this crisis. The present Racketeer

Influenced and Corrupt Organizations (RICO) Statute remedies are and will continue to be a deterrent to insurance crime.

Along with banking and securities, insurance is one of the most cash-intense industries. Thus, it is a natural attraction for criminal fraud. Insurance is especially attractive to the criminal mind because the premium is paid up front for a performance that may or may not occur. The nature of insurance transactions involving agents, brokers, insurance carriers, reinsurers, and insureds creates criminal activity that tends to involve many people working on a common plan of criminal activity or conspiracy. This is the very type of crime that RICO was envisioned to combat.

The impact of insurance fraud on insurance company insolvencies cannot be overstated. Congress is well aware that there are numerous insurance companies in the United States which are insolvent or in rehabilitation and the total shortage of assets to meet claims has been catastrophic to the insurance industry, and in fact, has created a "domino effect" which has caused other insurance carriers to, in turn, fail. The causes of the insolvencies may vary from case to case, but it is the overwhelming consensus of all involved that the chief culprit is fraud.

The bill in question (S. 438) will retroactively eliminate the treble damages in all pending litigation. In my State of North Carolina, the North Carolina Department of Insurance has a pending RICO action that was filed in December 1986. The commitment of money, manpower, expertise and time to this action has been staggering. I understand similar suits under RICO have been filed by state insurance departments in New York, West Virginia, Illinois, Missouri, Tennessee, Texas, Iowa, and Rhode Island.

The proposed amendments to S. 438 would not allow insurance commissioners to continue to bring RICO actions for insurance fraud. The present S. 438 allows the action to be brought by the chief legal officer of a state when the injury is to the state. When an insurance company goes insolvent, it is the insurance commissioner, not the attorney general, who is required under state laws to bring the legal actions, and in a RICO suit, the damages involved would not be to the state but to the insolvent company.

The battle of state insurance commissioners to curb and penalize fraud and corruption is already an unequal one: state regulators are generally limited by law to conducting litigation out of the assets of the insolvent company and frequently these prove to be no match for the almost unlimited resources available to the defendants, many of which are among the 500 largest financial and industrial concerns in the world, and most of which have, in addition to their own assets, substantial insurance coverage available to provide an almost unlimited defense.

In this unequal battle, the primary factor which creates a near-level playing field is the automatic availability of treble damages if a jury should find that the defendants engaged in acts made crimes by federal statutes. It is the availability of this penalty provision, which generally will have to be paid for out of the defendants own funds because insurance coverage is not normally provided for such damages, which will cause corporate defendants to think long and hard before bending, evading, and breaking laws in order to make a quick profit.

It must be emphasized that the activities which are the target of most suits brought by state insurance regulators under RICO are just as illegal as efforts by organized crime to extort money from small businesses. It must also be remembered that, in most instances, the amount of money which is drained from the insurance companies vastly exceeds anything which organized crime takes from the numerous rackets so familiar to the public.

For example, in a recent case filed in federal court in North Carolina, discovery documents indicate that one individual, the president of an insolvent insurance company, was able to take more than $6,000,000 out of the company and its affiliates in less than a four year period through a combination of commissions, brokerages, dividends, salaries and other schemes. Documents further make it abundantly clear that the defendant's ability to take this money was directly due to the funneling of business to his insurance companies by entities which are among the largest insurance brokerage firms in the world, and which did so with a callous and allegedly illegal disregard for the consequences to policyholders and other insurance consumers.

The specific provisions of S. 438, which cause problems are sections which would: (1) Not include receivers, liquidators and rehabilitators in the category of government entities, and make clear that suits can be brought for damages to the insolvent company. As a result, a higher burden of proof is imposed upon state insurance regulators in order to recover damages allowed for fraud against insolvent insurance companies than would be imposed upon governmental units in general; (2) Allow defendants a virtually automatic stay of substantive discovery in suits by state insurance regulators if a defense is raised of some reliance upon some applicable regulatory action; and (3) Affect the pending RICO cases filed by the states in a retroactive manner, thus changing the rules of the game in mid-course.

These provisions of the proposed RICO Reform Act of 1989 would have a chilling effect on anti-fraud activities of insurance regulators. They would cause a duplication of efforts at trial by requiring one standard of proof to establish the right to punitive damages. The provisions would add to the already long length of time it takes to try cases by providing an almost automatic stay of substantive discovery by allowing defendants to raise an affirmative defense of reliance on a regulatory action and to stay all other discovery until the availability of that defense is determined.

The present RICO law, provides several advantages to insurance commissioners as compared to other available remedies:

1. Under RICO, you can sue in your own federal district so long as some action took place there - even with a defendant from out of state or out of country.
2. Under RICO, you can use federal service of process rules, which are more useful than using state rules.
3. Depositions are easier under federal law as there is no problem with researching laws of other states.

4. Federal forum is more fair to defendants; you don't have the same court that decided rehabilitation overseeing the RICO action.
5. If no treble damages - defendant only pays out actual damages - no deterring effect - just cost of doing business.
6. In insurance proceedings you have court control; the court of rehabilitation always has creditors overseeing costs of RICO action.
7. RICO is the most economical way to police the insurance business; not using state funds; the commissioner of insurance has to be convinced of likelihood of return on investment of time and expenses and effort.
8. Commissioner of insurance as rehabilitators are protecting the public.

Several states filed their RICO's as guardians of the insurance consumers in their states, having weighed the commitment of resources that had to be made against the treble damage recovery to be had. To change that now would disrupt these regulatory efforts and award alleged wrongdoers.

When a company goes insolvent, most states guarantee payments of claims through guaranty funds. These funds are provided by all insurance carriers doing business in the state, but these funds are recovered by surcharging (within rates) consumers within that state. Thus, the insolvent company is a financial burden on all a state's citizens and any RICO damages received would help offset the potential cost to consumers.

Because insurance regulators regulate an industry (i) that is suffering its greatest company failure ever with the help of criminal fraud or conspiracy that has been compared to the crisis in the savings and loan industry; (ii) that is international in nature and often beyond control without laws such as the Federal RICO; (iii) and that is cash-intensive and, by its very nature, is prone to fraud by conspiracy-type criminal activity; state insurance regulators should be allowed to continue their fight against insurance crime using the present RICO power and remedies, including the deterrent of treble damages. RICO damages also help defer the cost of guaranty funds whose costs are ultimately paid by the consumer.

The failure to aid insurance regulators in this regard will dash the expected returns to victims in present RICO actions brought by state insurance regulators. There is much RICO-type crime in the insurance industry. The insurance regulators use the Federal RICO law as a tool to fight this crime. Any changes in the RICO Statute to hinder their efforts will not be in the best interest of this country.

The Federal RICO Statute is presently being utilized by various states to pursue remedies involving misconduct, crime, and other various adverse actions that have substantially and negatively effected various insurance companies. I, personally as Rehabilitator of Beacon Insurance Company have brought a RICO action in the Federal District Court in Eastern North Carolina, which has progressed from its initial filing in December 1986 to reach a stage where it has overcome the defendants' motion to dismiss and is proceeding rapidly into the discovery stage. Besides the North Carolina action, the Departments of Insurance in Illinois, New York, Tennessee, Rhode Island, Iowa, Missouri, West Virginia and Texas have filed insurance related RICO actions.

It is my belief, based upon conversations with my fellow Commissioners, that there is a possibility of such actions also being filed in other states.

What this shows is that the tool of RICO presented to the states by Congress is now being utilized to a great extent. With such utilization comes the commitment of scarce state resources to such litigation. Critics of such RICO actions might point out the fact that upon a successful conclusion of the action, attorney's fees along with treble damages will be awarded to the states. However, this attitude does not take into consideration the commitment a state must make in regard to allocation of manpower, time, administration, and attention and talents, which can never be fully compensated by a dollar figure. North Carolina and some of its sister states, when presented with the present opportunities and structure of RICO balanced against the expense and effort to be expended in a RICO effort, chose to bring such present RICO actions.

What concerns the NAIC is that having relied on RICO in its present version in choosing to bring actions, several states face the uncertainty of the "rules of the game" being changed on us in such a way that the possible benefits of recovery in the litigation are not as positive as when we filed our suits.

I and several of my fellow insurance commissioners, made decisions to proceed in filing RICO actions based upon the present RICO law. To have the law changed so as to immediately and negatively affect our actions causes us great fear and harm. We see the only beneficiary of such retroactive action to be the defendants in these actions; persons, who you may assume, we do not feel are very worthy of such a potential Congressional "gift".

Secondly, there has been much discussion by those seeking "reform" in RICO of eliminating the treble damage provisions of RICO and creating the requirement of prior criminal convictions. The effect of these measures would be the same; a sure and chilling effect upon private efforts to bring RICO actions.

Why should this be of concern to the NAIC and the various state governments it represents? We feel that it is absolutely clear that when the House of Representatives added the treble damages provision to the original RICO bill presented to it by the Senate in 1969, the intent was to offer a justified enticement to the private sector to assume some of the burden that had previously been borne exclusively by government attorneys, to fight the growing presence of crime and criminal activity in the American business community. Such a public policy of saving valuable and expensive government legal time and talents as a result of private RICO actions financed from non-governmental sources deserves as much support today as it received when both the Senate and House incorporated it as part of the RICO bill 20 years ago.

There are numerous RICO actions involving insurance fraud and crime that are presently being pursued by private plaintiffs at their expense against various defendants. These defendants have often violated insurance laws and otherwise would be subject to actions by state government. However, by virtue of these private actions, action by the state government has not been necessary in that, upon successful completion of these RICO actions, these defendants, by virtue of the remedies of treble damage and attorney's fees, would be effectively crippled both financially and reputation-wise so as to effectively eliminate them as a continuining source of danger in the insurance industry. This result would be similar to that achieved by action brought against the same persons by a state insurance commissioner.

The treble damages provision is the direct cause of the growing supplementation of government efforts to fight crime in American business by private actions. The only persons that have problems with this trend are those who are potential defendants. These persons who are certain that RICO actions are being brought against them with no basis in fact, claim that there is abuse of the RICO Statute. If this is the case, the way to combat the misuse of the RICO Statute against a defendant that it should not have been used against, is not to eliminate treble damages -- which has brought support in the fight against crime -- but to impose penalities against the plaintiff in favor of the defendant. This would be similar to those penalities presently provided by Federal courts in the case of frivolous actions. It appears S. 438 provides such relief to a "wronged defendant" by providing an award of treble costs to the defendant in case of frivolous actions. Also the wrongly accused defendant always has the protection of a Federal judge who will provide the defendant, if the defendant is entitled to the same, relief under a motion to dismiss or a motion for summary judgment.

Another area of great concern to my fellow Commissioners and myself is the provision in the proposed RICO amendment which would allow an affirmative defense upon the part of a RICO defendant to stop the progress of an ongoing action until such time the court may rule upon the merits of the defense. It seems highly unusual that in this day of extreme case load delay in our federal courts caused by the great number of cases and over-worked judges that a defendant would be allowed to stop a litigation "dead in its tracks" by filing an affirmative defense. If a defendant has an affirmative defense, fine, the defendant deserves relief from the court. But all defendants in federal court at this time get such relief either at the trial of the matter or at summary judgment, without an accompanying delay or stall of the litigation. To allow RICO defendants to forestall an ongoing litigation for months upon the filing of an affirmative defense would cause undue hardship on the plaintiff, his counsel and the dockets of federal courts. It would also give RICO defendants a right no other defendants now enjoy. Let's not confuse the call for "fairer treatment" of RICO defendants with a gift of "special treatment."

The NAIC urges Congress to look at this provision very closely, and we think Congress too will see this as unnecessary "special treatment" of RICO defendants.

The last main point I would like to make is that the Federal RICO Statute, as is now constituted, is perhaps the best tool an insurance commissioner can have to combat crimes and fraud against an insurance company and the public. This is because of the interstate and international nature of all insurance companies presently operating in this country. Although to date 27 states have some form of their own RICO Statutes, these are often limited in jurisdiction and because of their recent passage, they do not reach earlier fraudulent activities.

In fact in the Beacon litigation, I noted earlier, the judge dismissed the North Carolina RICO action filed against the defendant because the effective date of the North Carolina RICO action pertained only to actions by defendants that occurred after October 1, 1986.

There is a great danger in believing the argument that drastic amendments to the Federal RICO Statute and the corresponding negative effects upon the states can be offset by reliance by the states upon their present RICO Statutes. This may be true to a limited extent, but to those matters that have occurred in the 1980's or in present Federal RICO litigations, such argument does not hold water.

I will re-emphasize that my fellow insurance commissioners and myself fear the lack of fair play in any retroactive and drastic changes to RICO by either the House or Senate, while in mid-course of pending litigations. We fear the disastrous effect some of the proposed RICO "reforms" would have upon encouraging private sector actions against criminals. And we fear the loss of perhaps the most effective tool to use to fight fraud in the insurance industry. I would fear such results from S. 438.

NAIC

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National
Association
of Insurance
Commissioners

July 19, 1989

The Honorable Dennis DeConcini
United States Senate
Washington, D.C. 20510

Re: Responses to Questions on the Racketeer Influenced and Corrupt Organizations Reform Act (S. 438)

Dear Senator DeConcini:

Enclosed are responses to questions relating to S. 438. If you have other questions, I am happy to respond further.

Thank you for the opportunity to testify.

Very truly yours,

Jim Long

James E. Long
Commissioner
State of North Carolina
Department of Insurance

Attachment

Q. To what extent do state insurance commissioners rely on their states' statutory remedies for RICO type claims?

A. State RICO actions have serious jurisdictional problems. Thus, the Federal RICO is often the "weapon of choice" where there is much of an element of persons beyond the reach of the state courts. Fraud actions in state courts may not offer the damages necessary to fund the total claims against an insolvent company. However, if a state RICO statute, such as we have in North Carolina, can provide the relief needed, I would prefer being in a North Carolina court. I can assure you that because of the advantage that a state official has in being in a state court, that the state forum for an action is always considered.

Q. Along with any effort to amend RICO, do you feel that it is appropriate to require a standard of more culpability for the award of punitive damages?

A. The legal requirement for punitive damages, in my belief, requires some malice or bad faith. Such requirement is taken care of in the commission of predicate acts as required in the present RICO law. Thus, to require more culpability for punitive damages in the proposal is requiring "bad faith" upon "bad faith". If one commits some of the predicate acts set out in RICO, malice and bad faith is present to the extent of supporting punitive damages.

Q. In supporting the compromise legislation before the Committee, American business has indicated its willingness to give up its ability to use RICO to obtain treble damages in business-to-business disputes, in return for meaningful RICO reform. You state in your testimony that when an insurance commissioner sues as a liquidator or rehabilitator of an insolvent insurance company, he stands in the shoes of that company. Why then should the Commissioner, as the representative of the bankrupt company, be able to sue for treble damages, when the very same company would be unable to sue for more than actual damages if it were insolvent?

A. An insolvent insurance company has many negative aspects. Among them are the demands on state guaranty funds, manpower and financial burden upon state departments of insurance, and the "domino effect" of causing other insurance companies to fail.

Treble damages may insure full reimbursement to state guaranty funds, costs to state agencies, and payment of the general creditors of the insolvent company.

In context, a RICO act which harms a company, will be the major cause of weakening a company to the extent of having the entire company to fall to pieces. It would be fair to compare the effect of the RICO act to an insurance company to pulling the middle card out of a house of cards. The damages generated by the RICO act go far beyond the immediate harm. As such, the treble damages go far in helping rebuild the "whole house of cards".

Q. With regard to pending cases, do you feel that the language in this proposal is adequate to allow continued pursuit of treble damages for meritorious RICO actions? Why or why not?

A. The language in the proposal creates the possibility that a judge could eliminate treble damages from a pending RICO action. The basis of the judge's authority is clearly stated in the proposal. The retroactivity of taking away assured treble damages and in place of that leaving a judge's discretion has created much debate.

Many plaintiffs considered and weighted their decision to file RICO's based upon treble damages. By including treble damages, Congress told plaintiffs that it desired RICO's to be filed. Now does Congress want to say, by the proposed retroactivity; "we don't want you to file RICO's; sorry we encouraged you to do so earlier." One could get easily confused by such a fickle stand. By allowing present, pending RICO actions to retain treble damages, there will be no harm resulting from the change in Congress' signals to plaintiffs.

Q. One of your primary responsibilities is to protect the public against losses resulting from either insurer misconduct or insurer insolvencies. If you accept the proposition that civil RICO is being misused and that legitimate businesses, including insurance companies, have been the victims of abusive civil RICO suits, why aren't you concerned that the continued misuse of RICO's treble damage remedy may impair the viability of properly run insurance companies and force some into insolvencies?

A. First, a major contradiction is found in this question. An insurance company cannot be "properly run" and, at the same time, commit acts which would make it liable under RICO. Insurance insolvencies are to be discouraged, but cannot be used to excuse insurance companies' RICO penalties. If penalties are not "effective", then businesses might start considering them to be merely a part of the cost of doing business.

Q. How do you respond to the assertion by the Department of Justice in their testimony last year that there was a pressing need for civil RICO reform because the statute was being abused by private plaintiffs?

A. As an attorney, I feel there has, is, and will be abuse by plaintiffs of almost all civil laws. This problem of frivolous lawsuits is not limited to RICO cases. However, I feel that the Federal Courts have sufficient authority now to curb such suits. RICO defendants, who feel abused should resort quickly to the present relief available to them such as Rule 11.

Q. You have expressed concerns about the affirmative defense and, in particular, have contended that it will allow companies to give up defenses to valid RICO claims. Aren't these concerns fully met by the twin requirements (a) that any regulatory action on which the defendant relied must be in writing or by operation of law and (b) that such reliance must be in good faith?

So isn't it true, that this defense cannot be used to protect corrupt dealings by insurers or by commissioners because that would contravene the "good faith" requirement?

A. Much of the NAIC concerns over the affirmative defense centers around procedural problems. The Federal Rules of Civil Procedure require all affirmative defenses to be plead in the answer. The RICO amendment seems to avoid this and separates the defense from the answer. Also, there is no guidance on how the court should treat a RICO affirmative defense. Should it be handled as a motion for summary judgment? If there is a factual issue on the affirmative defense, does the court determine the facts? If so, what does this do to right to jury trial?

The facts which would support the good-faith affirmative defense would probably support a summary judgement motion under present Federal procedure. As the present RICO amendment now reads, the affirmative defense of good faith will give such RICO defendants preferred treatment which may not be allowable under the present Federal Rules of Civil Procedure.

Q. More generally, as insurance regulators, don't you believe that the companies you regulate should be entitled to rely on your interpretation of state law or your approval of their regulated activities, at least so as to avoid multiple damage RICO liability?

A. Reliance upon direct, relevant, and written regulatory guidelines or requirements strongly argue against any bad-faith upon the part of an insurer. The lack of such bad-faith will naturally cause a defense against most of a RICO action. I have two additional comments: one, I question the need for codifying this defense in RICO and two, I question whether this language would help State Farm Insurance Company in the Georgia lawsuit which State Farm claims as an example of why they need this affirmative defense.

Q. Isn't it true that many well-run and respected insurance companies have been the subjects of abusive RICO suits, and as a result have become leading advocates of responsible RICO reform?

Don't you agree with the conclusion of the American Bar Association that many (or at least some) of these suits were abusive?

Do you agree, that some RICO reform is necessary?

A. I am personally aware of the efforts of State Farm Insurance Company pushing for amendments to the present RICO law. As an Insurance Commissioner who is very active in the National Association of Insurance Commissioners, I'm not aware of any other large insurance company taking the same aggressive position as State Farm. In fact, just recently the Professional Insurance Agents withdrew from the informal coalition supporting the RICO amendment.

As an attorney, I feel that there has, is, and will be abuse of plaintiffs of almost all civil laws. This problem of frivolous lawsuits is not limited to RICO cases. However, I feel that the Federal Courts have sufficient authority now to curb such suits. RICO defendants, who feel abused should resort quickly to the present relief available to them such as Rule 11.

Based upon information I have read, the number of RICO cases filed and the negative burden of RICO upon the Federal Judiciary perhaps has been overstated. Therefore, I do not see a RICO "crisis".

Senator DECONCINI. Thank you, gentlemen.

Our last witness will be Mr. David Harrison, senior policy advisor, Council of Energy Resource Tribes. Mr. Harrison, I am sorry for the lateness today, and your statement will appear in the record. I have some questions. I am going to have to leave pretty quickly after your statement, so I am going to ask that I can submit these questions to you for answers, but you may proceed with a summary of your statement.

STATEMENT OF DAVID C. HARRISON, SENIOR POLICY ADVISOR, COUNCIL OF ENERGY RESOURCE TRIBES, DENVER, CO

Mr. D. HARRISON. Thank you, Mr. Chairman. We will be delighted to respond to any questions you may have, and I think I can keep this very short, as I tried to even in our written statement, and only, I, thank you for the opportunity to be here and point out what we regard as an apparent—what we hope is an oversight in your original drafting of this bill.

While the sponsors of this bill have clearly intended to keep the RICO remedies available to governmental entities as a law enforcement tool, unless Indian tribes are included in that group, there will be a substantial part of this country for which that law enforcement tool is not available. That part of the country is bigger than all of New England, with Pennsylvania and Maryland and Delaware added on to it.

Just from a practical and policy side, we would point out that as you have spent the last year uncovering and making public in one of your other hats, there seems to be—or it can sometimes be perceived that there are substantial incentives for organized enterprise criminality on Indian lands because law enforcement activities and law enforcement remedies are not so widely available in Indian country.

In other hearings that your other committee has held, you have heard from the FBI, you have heard from U.S. attorneys, you have heard from the Interior Department and the Justice Department about that. So in many cases, as even the Supreme Court has pointed out, the tribe itself is the principal provider of the civilized society in which commerce and life take place out there.

And this important tool of government that is being retained for other units and levels of government in the country, we suggest, must be maintained for the Indian tribal governments as well.

The implication of not retaining it for them is that you have greatly reduced the cost of conducting criminal business if it is conducted on Indian lands as opposed to neighboring non-Indian lands, and we are confident that nobody wants to let that implication persist out there.

We have some observations about other aspects of the bill, but I think you have got those other debates well and widely joined here and we won't get into that aspect of it. But I appreciate the opportunity to point this concern of ours out to you, and we look forward to working with you and your committee staff in any way we can to see that Indian tribes are afforded this important tool of Government as well.

Senator DeConcini. Mr. Harrison, we thank you for bringing this to our attention. As far as I am concerned, it was an oversight, and it just demonstrates, I hope, to Mr. Blakey and others that we are more than happy to entertain some additions or changes, not that we will agree to all of them, but we will certainly consider this one and we thank you for that.

Let me ask you on that subject matter, if Indian tribal governments were included, would your organization support the bill, or have they taken a position?

Mr. D. Harrison. We have not taken a position. We would hope, Senator, that some of our concerns—retroactivity, for instance—we probably, as a group of people in this country, have more experience with the issue of retroactivity than any other group in the country.

Just from our experience—and I won't purport to be an expert on all the pending RICO cases out there, but let me tell you from our repeated experience that there are precious few things that Government can try to do that are more dispiriting, that cause more cynicism, and that make people's confidence in the system wither faster than to see the rules changed on them in midstream.

Senator DeConcini. Thank you, Mr. Harrison. I will submit the questions.

[The prepared statement of Mr. D. Harrison and response to questions follow:]

STATEMENT
OF
COUNCIL OF ENERGY RESOURCE TRIBES

Before the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

Regarding

RICO REFORM ACT OF 1989

by

David C. Harrison
Senior Policy Advisor
Council of Energy Resource Tribes

June 7, 1989

STATEMENT OF THE COUNCIL OF ENERGY RESOURCE TRIBES BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE REGARDING THE RICO REFORM ACT OF 1989

The Council of Energy Resource Tribes is a membership organization composed of 43 federally recognized Indian tribes from the length and breadth of the nation, and collectively we represent more than one-half of the Indian reservation land in the contiguous United States and more than one-half of all Indians living on reservations today. The area covered by our lands, if placed together, would be much larger than all of the New England states combined. The Navajo Reservation alone is larger than West Virginia.

We have two major concerns with this bill as presently written. The first of these is an apparent oversight in that the bill as introduced does not reflect the role that Indian tribes play in the governance of America. We certainly concur with the proposal to retain the remedy of treble damages for governmental entities, including the states and the United States. We suggest, however, that this remedy should be available to Indian tribes as well as to other governmental entities. We hope that the Committee will see fit to correct this oversight in the present bill.

Whatever the merits of the contention that RICO has been abused in civil litigation, it does not seem to be contested that the civil remedies of the original statute should be preserved for governmental entities. In this regard, it certainly has never been contended that Indian tribes have abused the judicial process by overreaching to bring civil litigation under the umbrella of RICO.

On the other hand, all the reasons that have counsel retention of the full panoply of RICO rights and remedies for states and the United States apply with equal force to Indian tribes. The nation's Indian tribes do play a more significant role in the governance of America than is generally recognized. The Supreme Court of the United States has recognized that often an Indian tribe is the principal provider of the civilized society in which the commerce and the pursuit of happiness may flourish in significant regions of the country. As indicated earlier, the area governed by Indian tribes in this country is much larger than all of the New England states combined, and some reservations are larger than some states. Even in our larger Western states, when the land owned and administered by federal agencies is removed from the equation, we find that the territory governed by Indian tribes is comparable to that governed by the states themselves.

As Senator DeConcini of this Committee has just spent a year demonstrating in his Special Committee on Investigations of the Senate Select Committee on Indian Affairs, these tribal governments face all the problems in law enforcement that confront any other unit of government in our modern political economy. Indian tribes must deal with problems of infiltration of organized crime; with fraudulent financial practices; with the commercial exploitation of their lands and waters by the illegal dumping of hazardous and toxic wastes; with corruption among contractors who conduct business with tribal governments; and with widespread and systematic theft of the natural resources of lands belonging to Indian tribes and their members. All these and other illicit activities are conducted as a matter of profitable criminal enterprises within the areas governed by Indian tribes, just as they are conducted within areas governed by the states and their political subdivisions.

In the last ten years, RICO has become an important tool for law enforcement officials in their continuing efforts to combat increasingly sophisticated white collar crime. And this is no less true for Indian tribes than for any other level of government in our society. We are confident that there was no intention to imply that this important tool should be denied to Indian tribes, and we hope that this Committee will see fit to correct this oversight.

In this regard, we would also like to point out that in some respects, the need for a law enforcement tool such as RICO may be even more acute for Indian tribes than for other units of government. The files of the Senate Select Committee on Indian Affairs are thick with documented evidence provided by U.S. Attorneys, the FBI, tribal police, and Bureau of Indian Affairs criminal investigators regarding the law enforcement needs of Indian tribes and their reservation homelands. The unfortunate truth is that, for too long, these needs have been overlooked in legislation such as that before us today. As a result, organized criminal enterprises often seem to seek out Indian lands as a safe haven in which to ply their illicit trades. The cultivation of illegal drugs; the provision of kickbacks and other forms of corruption of government contracting; skimming from gaming operations; the illegal dumping of hazardous and toxic wastes; and the systematic and continuing theft of oil from producing properties are all forms of criminal enterprise operating on Indian lands that have been well documented in recent years. Many of these Senator DeConcini's Special Committee on Investigations has painstakingly uncovered and revealed in public hearings in only the last few months. The crimes of violence that are often associated with the maintenance of these criminal enterprises have been well documented as well.

We urge this Committee not to permit the continued implication that the laws of our land provide marked incentives for the operation of criminal enterprises on Indian lands by greatly reducing the cost of doing business there. We urge the Committee not to permit the implication that the penalties for RICO predicate crimes or other felonies are greatly reduced if those crimes are perpetrated against Indian tribes rather than against their non-Indian neighbors. In short, we urge this Committee not to deny to Indian tribes the important prosecutorial law enforcement tool that RICO has become in recent years. For we are confident that this Committee recognizes as well that the pernicious effects of criminal enterprises are not restricted to their immediate victims. The drugs grown on our lands are sold on your streets. Monies skimmed from our gaming operations are invested in the acquisition of businesses and properties in your cities. And the ultimate costs of the dumping of hazardous and toxic wastes into our water systems are borne by all downstream users. For all these reasons, we respectfully urge this Committee to correct this oversight, and to provide this important law enforcement tool to the nation's Indian tribes as significant governmental entities in our federal system, just as it is provided to other units and levels of government.

Our second major concern with this bill as presently drafted is far more general, and we generally leave that debate to others whose interests are more acutely affected. We would like to take this opportunity, however, to offer a few comments regarding the sweeping character of this legislation. Although we are not convinced that that the need for reform is so immediate and so pressing as the bill's sponsors suggest, neither do we suggest that there have not been attempts to abuse the rights and remedies conferred by RICO in commercial litigation. We do suggest, however, that whatever reforms are needed might be more narrowly tailored to deal with such abuses as have actually occurred.

It occurs to us that legislation as broad in scope as this almost necessarily involves generalizations and assumptions that, too often, are not even recognized until after the fact. For example, this bill as drafted is particularly sensitive to crimes of physical violence. The incidence of violent crime of all types is tragically and unacceptably high in our Indian communities, and we certainly have no quarrel with this aspect of the bill. We also note that the bill provides enhanced opportunities for redress for certain groups and classes of people, such as non-profit organizations, etc.

In the spirit of the Chairman's invitation to let the dialogue begin, we respectfully suggest that the bill as presently written misses the mark, narrowly perhaps, but misses, nevertheless. We suggest that to the list of groups for whom enhanced remedies are proposed there might be added the lame, the handicapped, the blind, the illiterate, and the elderly on fixed incomes. In other words, we think the sponsors of this bill have recognized that there are especially vulnerable classes of people in our society, and that those who would prey on the vulnerable should be subjected to increased sanctions. We suggest that any effort to list these groups, as has been attempted here, will soon prove to be as fraught with difficulties as this one surely was.

We would like to suggest to the Committee in this regard that those who would practice their criminal enterprises against the especially vulnerable in our society also perpetrate a violence that is no less heinous than physical harm. They perpetrate a violence to the human spirit. It is this violence that, in turn, too often engenders among its victims the kind of physical violence which this bill does address. Implicit in this bill as drafted is an acknowledgement that as a society we will accept recovery, but we will not demand retribution from those who would do violence to the human spirit of the already vulnerable and susceptible members of our community. With this in mind, we urge the Committee to give careful attention to the views of those who today have urged you to reconsider many of the assumptions and generalizations that are inevitable in legislation as sweeping in scope as this.

On behalf of the 43 member tribes of the Council of Energy Resource Tribes, I want to express our deepest appreciation for the opportunity to appear today and share our concerns with this Committee in these important deliberations. This is a matter of great import to us, and we are anxious to provide whatever assistance we might be able to offer as this important legislation proceeds through the Congress.

Thank you.

SENATOR DENNIS DeCONCINI

QUESTIONS FOR DAVID HARRISON
COUNCIL FOR ENERGY RESOURCE TRIBES

1) Mr. Harrison, of the 43 federally recognized Indian tribes the Council represents, how many are located in Arizona? How does the Energy Resource Council function in relation to each tribal government? Does the Resource Council participate in the affairs of individual tribal government affairs?

2) Mr. Harrison, in your written testimony you indicate that the Council of Energy Resource Tribes has two major concerns regarding the RICO legislation now being considered by the Committee. The first concern being that all the rights and remedies available to governmental entities under S. 438 be made available to tribal governments.

In support of your position you state that tribal governments face all the problems of law enforcement that confront other units of governments, and in some cases, more problems than other governments. Based on my work with the Special Committee, I would tend to agree with you.

Are you aware of any tribal governments that have developed their own RICO statutes? If not, do you know if any tribes are considering such laws? I am familiar with the Arizona state RICO statute, and as Assistant Attorney General Twist has testified, that statute has been successfully utilized in Arizona for some time.

3) Mr. Harrison you suggest that any reforms addressing abuses of the RICO statute be drafted more narrowly. Do you have any specific suggestions?

4) You also contend that the list of groups to which treble damages remain available should be expanded beyond those who are the victims of physical harm. How would you propose to define such a class?

ANSWERS TO QUESTIONS OF SENATOR DeCONCINI TO DAVID HARRISON OF THE COUNCIL OF ENERGY RESOURCE TRIBES REGARDING THE RICO REFORM ACT OF 1989

1) In Arizona, Senator, there are three tribes that are members of the Council of Energy Resource Tribes. These are the Navajo, Hopi, and Hualapai Tribes. Like all the member tribes of CERT, each of these tribes is represented on the CERT Board of Directors by the chief elected officer of the tribe, and each tribe has one vote in the deliberations of the Council of Energy Resource Tribes. Work performed by the CERT staff for these tribes is initiated and requested by the tribe itself and supported by a tribal resolution requesting the work. Each engagement is budgeted and managed by a professional staff member, working in cooperation with the officials or staff of the tribe designated by the tribal leadership. The exception to this method of working with tribes involves those issues that are of multi-tribal concern. Examples of this kind of work include the work we have done in cooperation and conjunction with both the Navajo and Hopi Tribes, for instance, in such areas as protecting the monies paid into tribal accounts of the abandoned mine lands fund and work with both tribes in rulemaking regarding the valuation for royalty purposes of coal produced from federal and Indian lands.

Regarding CERT participation in individual tribal government affairs, there is none. The founding tribes of CERT established a firm organizational principle at the outset that the organization could survive as a truly tribal organization only so long as it respected and was responsive to the internal political decisions made by the electorate of each member tribe. Thus, for example, Chairman MacDonald was one of the founders of CERT and served as the chairman of the organization during his first tenure as chairman of the Navajo Nation. When, in 1982, he was replaced as tribal chairman, his position in the CERT organization automatically passed to his successor, Chairman Zah. Chairman Zah, in turn, put the matter of the Navajo Nation's continuing involvement in the CERT organization to the Navajo Tribal Council. When the Navajo Tribal Council voted 56 to 6 to continue to participate in CERT, Chairman Zah took his place on the Board of Directors and the Executive Committee of the organization and designated his vice-chairman, Mr. Edward T. Begay, as the principal delegate of the Navajo Nation to the CERT organization. Mr. Begay provided much leadership to the organization during his tenure, and the organization conducted a substantial amount of work for the Navajo Nation during that period. When Chairman MacDonald resumed the chairmanship in 1986, he likewise continued the tribe's participation in the organization. In recent days, we have met with Mr. Haskie, the interim chairman of the Navajo Nation, and we expect the tribe to remain an active CERT member during his term in office as well. We are attaching a recent letter from Interim Navajo Chairman Leonard Haskie which reflects the relationship that the CERT organization has enjoyed throughout this succession of elected leadership of the Navajo Nation.

In short, the CERT organization does not involve itself in the internal affairs of individual tribal governments, and we believe this bedrock principle which was early established by the tribal leadership of the organization has been one of the principal reasons that the organization has retained all but two of its 25 founding member tribes, and has grown from 25 to 43 member tribes today.

I would also like to take just a moment, Mr. Chairman, to provide you with some indication of the range and kinds of work we have done for Arizona tribes over the past 14 years. We have performed over 30 different projects for the Navajo Nation during this period, ranging from assistance in oil and gas negotiations to energy impact planning; from assessing the feasibility of a leveraged lending program to review of uranium exploration and development agreements; from analysis of uranium mill tailings problems to the development of computer software for energy project evaluation. One example, I believe, will provide you with an indication of the value of our work for the Navajo Nation. A major oil company offered a one-time $300,000 payment for a twenty-year right-of-way renewal for a pipeline across the Navajo reservation. Upon conclusion of negotiations conducted by CERT's chief economist, an agreement was signed which will result in payment to the tribe of $92 million over the twenty-year period. The value of that agreement in 1979 dollars, the year in which the agreement was concluded, was some $14 million, as opposed to the $300,000 originally offered.

We have performed work for the Hopi Tribe ranging from assessing the feasibility of a tribal radio station to trust lease negotiations and assistance in establishing a tribal data base management system. The Chairman of the Hopi Tribe presently serves as the Chairman of the Tax Committee of the CERT Board of Directors and in that capacity provides significant leadership to the entire CERT organization. For the Hualapi Tribe, we have conducted uranium market studies, provided assistance in uranium lease negotiations, and assisted in the conduct of an environmental assessment of uranium development impacts.

We have also worked closely with other tribes and tribal organizations in Arizona that are not members of the CERT organization. We have found the Inter-tribal Council of Arizona, for instance, to be one of the most knowledgeable and dependable allies in Indian country in the area of environmental protection, and have greatly enjoyed our association with them. We should point out that our involvement is not by any means a one-way street. When we held our annual American Spirit Award Dinner in Phoenix in 1988, the Inter-Tribal Council also provided invaluable assistance to us with local logistics and much of the behind the scenes local volunteer effort without which such events almost invariably stumble badly. We have assisted the Colorado River Indian Reservation Tribes with the development of environmental programs and the preparation of air quality program proposals.

Finally, the tribes of the Gila River Reservation have expressed great appreciation for our work for them in right-of-way negotiations for a crude oil pipeline. In that instance, they were offered some $76,000 for a one-time payment for a twenty-year easement. Instead, following negotiations conducted by CERT staff, an agreement was reached that will result in an annual payment of some $80,000 to the tribes over the twenty-year life of the easement.

We appreciate your interest in our relationship with the Arizona tribes and are pleased to be able to report to you that not only have the CERT member tribes from Arizona provided much of the leadership of the CERT organzation since its inception in 1975, but that we have greatly enjoyed our association and work with many of the other tribes and tribal organizations in Arizona in recent years. We believe that these relationships are a direct function of the fact that the real leadership of the CERT organization is provided by the tribes themselves, and those of us who are privileged to work for them are seldom permitted to forget that it is just that — a privilege and not a right.

2) To date, no tribe has enacted a RICO statute of its own. The National Indian Law Library, maintained by the Native American Rights Fund in Boulder, Colorado, has made an effort to compile all the tribal codes in the country, and they confirm that they have no tribal code in their collection that contains either a criminal or civil RICO statute. In this regard, we do not believe that including Indian tribes as governmental entities for purposes of RICO reform will have any appreciable effect on the caseload of our federal judiciary because federal jurisdiction already lies in most civil litigation involving Indian tribes and, as you know, the Supreme Court in the Oliphant decision has denied criminal jurisdiction over non-Indians to Indian tribes. While we believe the Oliphant decision to be ill-conceived and to have been largely undermined by subsequent developments in Indian law, it, nevertheless, remains the law today.

3) With regard to drawing civil RICO reforms more narrowly, it has occurred to us, for instance, that the provisions requiring that only a state attorney general can bring suit on behalf of a state are overly restrictive, particularly where regulatory agencies have traditionally enjoyed the authority to bring suit on behalf of a state. So far as we are aware, the allegations of abuse which give rise to the RICO reform efforts have not focused on abuses by state agencies or their counsel. With respect to Indian tribes in particular, most tribes do not have an attorney general or even a salaried officer who plays an equivalent role. That is why we suggested in our recommended amendment that the requirement be that such suits must be brought by an officer of the court authorized to sue in the name of the tribe.

It also occurs to us that it would not be difficult to remove from the reach of civil RICO suits arising from labor disputes or divorce. While we have no basis for disputing the Committee's views that civil RICO has been invoked in inappropriate cases involving strictly commercial disputes, we are also aware of some concerns, particularly small businesses that have been unconscionably victimized by much larger entities that are engaged in routine practices that can only be characterized as organized scams. We simply do not understand the public purposes which would be served by exempting the securities and commodities industries from the sanctions of RICO. In fact, we urge the Committee to review carefully the prospect of providing for increased sanctions for frivolous or abusive claims under RICO as a means of addressing such abuses as may have occurred, rather than to take away from deserving claimants the remedies which the law now affords them.

Finally, we cannot approve of the affirmative defense that would be permitted by reliance on regulatory agencies. We have had considerable experience in this area. One such instance resulted in the negotiated, legislated resolution in the last Congress of enormously vexing problems arising from natural gas accounting practices during the period from 1982 to 1986. There can be no doubt in that case that the industry realized explicitly that some accounting practices utilized during that period were contrary to duly promulgated regulations that had the force and effect of law. High-level agency officials, however, in fact, blithely conceded that they had advised many operators simply to ignore the regulations. While we were able eventually to negotiate a resolution that the Congress enacted into law, we certainly would not have been able to do so if the black letter law provided an affirmative defense of relying on agency advice that was known to be contrary to law. The Department of the Interior estimated the value of that issue to Indian mineral owners at some $7 million. We estimate it to be more nearly $22. million.

4) We believe that small businesses contracting to the Department of Defense, or subcontracting to Defense contractors should have RICO sanctions available for predicate offenses committed by the insurance and surety industries; we believe that ERISA plans should have enhanced sanctions available to them. Defense contracting has become a significant element of many tribes' efforts to establish stable and diversifed reservation economies, and the fraudulent practices which these enterprises have encountered in the insurance and surety industries are certainly not peculiar to Indian-owned businesses. In fact, we believe that insurance and surety scams have become particularly lucrative businesses for unscrupulous members of these industries. The people ultimately victimized by financial fraud perpetrated against retirement and pension plans include not only the members of those plans, but the public who must ultimately undertake their income and health maintenance.

In conclusion, Mr. Chairman, let me express our deepest gratitude for the interest which you have shown in our views on this entire range of issues. Our principal purpose in appearing here, of course, remains merely to point out what you have already graciously conceded to be an oversight in the original drafting of this bill, namely, the omission of Indian tribes as governmental entities entitled to treble damages in appropriate RICO cases. In attempting to be constructive in our appearance here, we have devoted a great deal of time and soul-searching to the entire range of issues presented by the efforts at RICO reform, and we certainly do not envy you the task you have taken upon yourself. We realize that criticism of a statute like this, however constructive it is purported to be intended, is a far different and far easier exercise than its actual construction, and we cannot but admire the minds that have been at work on the bill before us. Senator DeConcini, your willingness to hear us out on all these matters is a source of great encouragement to our confidence in our system of government, and of your personal commitment to enhance the capabilities of Indian tribes to take their place in the responsible government of America. Thank you very much.

THE NAVAJO NATION

LEONARD HASKIE
INTERIM CHAIRMAN
THE NAVAJO TRIBAL COUNCIL

IRVING BILLY
INTERIM VICE CHAIRMAN
THE NAVAJO TRIBAL COUNCIL

April 17, 1989

Mr. A. David Lester
Executive Director
COUNCIL OF ENERGY RESOURCE TRIBES
1580 Logan Street - Suite 400
Denver, Colorado 80203-1941

Dear Mr. Lester:

According to Mr. Derrick Watchman, Acting Executive Director of the Office of the Navajo Tax Commission, the Council of Energy Resource Tribe's (CERT) Board Meeting, Energy Forum and 1989 Spirit Award Dinner were quite successful. Your efforts in maintaining CERT's position in Indian energy development, particularly Indian youth education and CERT's relationship with the Navajo Nation is appreciated.

Mr. Watchman informed me that with your help a Tax Committee was formally adopted by the CERT's board. This is a good step towards unity. I envision a long lasting place for this committee in regards to Federal-Indian tax policy development.

Similarly, I look forward to our continued relationship with CERT. It is anticipated that if we jointly attack favorable policy changes for Indian country, we will all benefit. I know you share this same feeling.

Respectfully yours,

Leonard Haskie, Interim Chairman
Navajo Tribal Council

ATTACHMENTS

xc: Irving Billy, Interim Vice Chairman
Navajo Tribal Council
Peter J. Korth, Tax Commissioner
David C. Brunt, Tax Commissioner
Navajo Tax Commission
Bruce A. Keizer, Tax Attorney
Office of the Navajo Tax Commission

Post Office Box 308 • Window Rock, Navajo Nation (Arizona) 86515 • (602) 871-4941

Senator DECONCINI. We have a statement from Senator Hatch which we will insert in the record at this point.

[The statement of Senator Hatch follows:]

From the office of
SEN. ORRIN HATCH
Washington, D.C. 20510

June 7, 1989 Contact: Paul Smith, 202/224-9854

STATEMENT OF SEN. ORRIN HATCH
BEFORE THE SENATE COMMITTEE ON THE JUDICIARY
HEARING ON RICO

I want to thank both Chairman Biden for this scheduling this hearing and Sen. DeConcini for chairing it and for his leadership on this issue.

I am pleased to be a co-sponsor of S. 438, the RICO Reform Act of 1989. I firmly believe there is a broad consensus for reform of the civil provisions of the Racketeer Influenced and Corrupt Organization Act. This is not the first effort to achieve such reform, but I am hopeful that this time we will be successful.

The civil provisions of RICO have been used in cases ranging far afield from Congress' intent when it first enacted RICO in 1970. As a result of what I consider to be a serious abuse of the civil RICO provisions, businesses that have no connection whatsoever to organized crime are labeled racketeers and subjected to the threat of treble damages — a threat that should be aimed at real racketeers. This terrible injustice results from imprecise drafting in 1970 that Congress should now redress.

Congress enacted RICO in 1970 to attack organized crime and its infiltration of legitimate businesses. As chief Justice William H. Rehnquist recently said, "Virtually everyone who has addressed the question agrees that civil RICO is now being used in ways that Congress never intended when it enacted the statute ... Most of the civil suits filed under the statute have nothing to do with organized crime. They are garden-variety civil fraud cases of the type traditionally litigated in state courts..."

The government's use of the criminal and civil provisions of RICO is at least constrained by the self-restraint of prosecutional discretion. A private plaintiff's use of civil RICO and its treble damage remedy, however, is under no such constraint. Civil RICO is a potent weapon that plaintiffs can use against a business in an ordinary contract, fraud, or other commercial dispute. As then Judge Anthony Kennedy said, in a concurring opinion in Schrieber Distribution v. Serv-well Furniture Co., 806 F.2d 1398, 1402 (9th Cir. 1986): "A company eager to weaken an offending competitor obeys no constraints when it strikes with the sword of the Racketeer Influenced and Corrupt Organization Act ... It is most unlikely that Congress envisaged use of the RICO statute in a case such as the one before us, but we are required to follow where the words of the statute lead..."

Civil RICO has been used in sexual harassment cases, landlord-tenant disputes, wrongful discharge cases, and against a union in a labor dispute. These kinds of cases are cognizable under state law, other federal statutes, or both; but these cases have nothing to do with organized crime, Congress' acknowledged target in 1970.

A strong case could be made for going much further than S. 438 goes in curtailing the misuse of civil RICO outside of its originally intended ambit. A credible case can be made for denying outright a federal forum under civil RICO for all cases unrelated to organized crime. This, of course, would allow plaintiffs to rely upon traditional state law remedies or other applicable federal statutes for redress of grievances in cases not involving organized crime. This bill, however, does not take that step. No cause of action is removed from the ambit of civil RICO. Under the bill, however, automatic treble damages are only available in certain circumstances; in certain other cases, attorneys fees and punitive damages, in addition to actual damages, are available to plaintiffs; and in many other cases, recovery is limited to actual damages.

Mr. Chairman, I look forward to hearing our witnesses this morning.

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Senator DECONCINI. We also have statements submitted for the record from Harry Bonsall of First Interstate Bank of Arizona, Philip Feigin, securities commissioner of the Colorado Division of Securities, on behalf of the North American Securities Administrators Association, and H. Laddie Montague, of Berger & Montague of Philadelphia, which will also be inserted in the record.

[The statements of Mr. Bonsall, Mr. Feigin, and Mr. Montague follow:]

First Interstate Bank of Arizona, N.A.
First Interstate Bank Plaza
P.O. Box 29751
Phoenix, AZ 85038-9751
602 229-4825

First Interstate Bank

Harry Bonsall III
Vice President Secretary
to The Board of Directors

May 22, 1989

The Honorable Senator Dennis DeConcini
United States Senate
Washington, DC 20510

RE: HR 1046, S438

Dear Senator DeConcini:

I am writing to urge your support of the above-referenced legislation that would reform the Racketeering-Influenced and Corrupt Organizations Act (RICO). RICO permits persons with ordinary routine business disputes with businesses to sue for triple damages and their attorney's fees, even though the business has not been convicted of a racketeering offense and even though the plaintiff has not suffered any special racketeering injury. The cost of defending these suits is extremely high irrespective of their lack of merit, legitimate businesses end up spending huge sums of money for discovery costs just to get to the stage where a case can be dismissed for lack of merit. The fact that a plaintiff has the prospect of triple damages enables it to escalate settlement demands, with no corresponding public benefit.

HR 1046 and S438 would eliminate the triple damage remedy from RICO in most of these cases. Government prosecutors would still be able to use it and private parties would still be able to use it where defendants have been convicted of racketeering offenses that caused injury to the plaintiff. However, it would not be useable in garden-variety commercial disputes any longer.

Letter to Senator DeConcini
May 22, 1989
Page 2

The RICO reform the HR 1046 and S438 would bring would be retroactive. However that is not unfair in an area like this where all concerned acknowledged it was a mistake to draft RICO so broadly as to enable it to be used against ordinary businesses. That mistake ought to be cured and it ought to be cured retroactively so as to enable the thousands of legitimate business enterprises that are currently defending such suits to avoid any further unfair and unnecessary costs.

Very truly yours,

Harry

HB/ke

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

NASAA

555 New Jersey Avenue, N.W., Suite 750
Washington, D.C. 20001
202/737-0900
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HAND DELIVERY

June 6, 1989

Mr. Ed Baxter
Chief Counsel/Staff Director
Subcommittee on Patents, Copyrights
and Trademarks
Senate Committee on the Judiciary
327 Hart Senate Office Building
Washington, D.C. 20510

RE: S. 438, PROPOSED LEGISLATION TO REFORM PRIVATE CIVIL RICO

Dear Mr. Baxter:

On behalf of the North American Securities Administrators Association (NASAA), enclosed is written testimony submitted for the record concerning S. 438, proposed legislation to reform private civil RICO.

While we are disappointed that we were not allowed the opportunity to present testimony and answer questions at the hearing scheduled for tomorrow, June 7, before the Committee on the Judiciary, we are nonetheless appreciative for the opportunity to submit written testimony.

Please feel free to contact me at (202)737-0900 if you have any questions concerning NASAA's position on S. 438.

Sincerely,

Maureen A. Thompson
Legislative Director

Enclosure

President: John C. Baldwin (Utah) • **President Elect:** Susan E. Bryant (Oklahoma) • **Secretary:** Merrill H. Wigginton (Prince Edward Island)
Treasurer: Debra M. Bollinger (South Dakota) • **Directors:** Christine W. Bender (California), John B. Hiatt (New Mexico), H. Wayne Howell (Georgia), Richard D. Latham (Texas) and John R. Perkins (Missouri) • **Executive Director:** Lee Polson

STATEMENT OF

PHILIP A. FEIGIN,
SECURITIES COMMISSIONER,
COLORADO DIVISION OF SECURITIES

on behalf of the
NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION

before the
COMMITTEE ON THE JUDICIARY
U.S. Senate

The RICO Reform Act of 1989
S. 438
And the Issue of Private Civil RICO

June 7, 1989

Mr. Chairman and Members of the Committee:

My name is Philip A. Feigin. I am vice chair of the Enforcement Section of the North American Securities Administrators Association (NASAA) and commissioner of the Colorado Division of Securities. I appreciate the opportunity to submit written testimony on behalf of NASAA concerning the RICO Reform Act of 1989 (S. 438) and the issue of private rights of action under Title 18, U.S.C. section 1961 et seq., the Racketeer Influenced and Corrupt Organization Act (RICO).

NASAA's members are the agencies that supervise the securities industry, regulate the capital markets and enforce investor protection statutes in the 50 states and the District of Columbia. NASAA is devoted to the protection of investors from fraud and abuse in the marketplace. It is with this important goal in mind that on July 20, 1985, the NASAA Board of Directors adopted the following resolution:

> Be it resolved that the Board of Directors of the North American Securities Administrators Association, Inc. (NASAA) fully supports the concept of private rights of action under the federal Racketeer Influenced and Corrupt Organizations Act (RICO) involving securities, mail and wire fraud, and therefore strongly supports both retention of federal securities, mail and wire fraud violations as predicate offenses, and retention of treble damages for private civil actions under RICO. The Board of Directors is aware that claims of abuse of private civil RICO in the securities, mail and wire fraud area have been voiced. NASAA supports congressional

> examination of these claims, inquiry into areas of potential abuse, and consideration of limited statutory modifications to RICO to reduce the potential for such abuse if indeed they exist. However, it is paramount that the essential concept of private civil RICO remedies as now in place in the context of securities, mail and wire fraud be retained and not undermined.

We come before you today to speak in opposition to S. 438. Enactment of S. 438 would fundamentally undermine private civil RICO in the areas of securities, commodities, mail and wire fraud to the grave detriment of the investing public. White collar criminals would breathe a collective sigh of relief.

I have been involved in the investigation and prosecution of state securities law violations for more than ten years, both in Wisconsin and Colorado. I have been actively involved in NASAA for most of that time, participating in the development of its members' enforcement initiatives, policies and programs. I have been a member of the Advisory Committee on State/Commodity Futures Trading Commission Cooperation for over three years, and have served as a member of the State Regulation of Securities Committee of the Business Law Section of the American Bar Association for several years.

In my ten years of state securities law enforcement experience, white collar crime has grown from a major problem to a national catastrophe. National scandals involving check-kiting, money laundering, defense contractor fraud, banking and savings and loan association fraud, insider trading, commodities fraud and manipulation in the penny stock market have significantly eroded the public's faith in our markets, industries and financial institutions, and raised fundamental questions about our commercial ethics as a nation. Yet, it is in the context of this crisis of faith and ethics that members of the financial community have called upon Congress to emasculate private civil RICO.

We will discuss the issue of RICO reform in three parts: an overview of RICO and its application to investment fraud; a specific critique of some of the provisions of S. 438; and, possible alternatives for reform.

RICO and Investment Fraud

The essence of RICO is deterrence. For use against those who operate an enterprise in a manner constituting a pattern of indictable securities, mail or wire fraud, federal prosecutors using RICO have as added weapons enhanced criminal penalties and, more importantly, forfeiture. In an effort to recruit "private attorneys general" to combat white collar investment crime, private civil RICO provides treble damages, costs and attorneys fees to private civil litigants who prevail.

The number, size and scope of investment frauds detected in just the last few years are well documented and staggering. Indeed, the fictional outrages depicted in the film Wall Street seem to pale in the shadow of the actual frauds that have monopolized the business headlines for the last few years. At a panel discussion in April of this year, Assistant United States Attorney Bruce A. Baird, prosecutor in the Drexel and Milken cases, stated that the crimes detected in those investigations represented only "the tip of the iceberg."

At the same time, prosecutorial and regulatory resources remain very limited, with little realistic hope of material improvement. It was recently reported that the budget of the Securities and Exchange Commission (SEC) was less than that of the budgets of the military bands of the various branches of the armed services! The resources of the Commodity Futures Trading Commission (CFTC) are even more paltry. State prosecutorial resources are limited as well. Prisons are overflowing with inmates convicted of violent crimes. It is unreasonable to expect that criminal prosecution in the white collar area will reach most of those who engage in criminal conduct.

The widespread evidence of investment fraud is undermining the public's confidence in our markets. Federal and state governments have reacted with task forces, undercover investigations, statutory and regulatory initiatives, criminal prosecutions and enhanced budget requests, but these will not be enough.

S. 438 and Investment Fraud

Under RICO, private plaintiffs may sue for treble damages, costs and attorneys fees. S. 438 would make some fundamental changes. Many have argued that current RICO is too complicated and confusing. S. 438 follows in RICO's tradition. Nonetheless, once one successfully tracks through the convolutions and intricacies of the bill, the conclusion is inescapable: Under S. 438, private civil RICO's enhanced remedies for securities, mail and wire fraud would be eliminated in all but the rarest circumstances.

S. 438 would eliminate treble damages plus costs and attorneys fees in almost all private civil RICO investment fraud actions and replace them with actual damages, costs and attorneys fees in only the rarest instances, and the opportunity to seek and recover punitive damages of up to twice the actual damages. Even a straight up swap of mandatory treble damages for discretionary punitive damages would have the obvious effect of making the suits somewhat less desirable to plaintiffs and counsel. S. 438 goes much further than a simple swap.

1. The "Natural Person" Requirement

S. 438 [at proposed Section 1964(c)(1)(B)(iii)(I)] would limit those who could bring investment fraud private civil RICO actions to "natural persons," to the exclusion of investment companies, pension funds, banks, savings and loan associations, perhaps even general and limited partnerships and class actions, and more. The one exception to this limitation is for some institutions, i.e., specifically designated non-profit corporations, indenture trustees, pension funds and investment companies, which may still seek enhanced RICO remedies in insider trading cases.

NASAA respectfully submits that the "natural person" limitation is unconscionable. According to a recent Securities Industry Association (SIA) study[1], small investors now account for only 18.2 percent of total Big Board trading volume. Institutions account for 54.6 percent of that volume (brokerage firms trading for their own accounts constituted the remaining 26.2 percent of the market). It is those institutions that would in most cases be denied standing to seek enhanced remedies in private civil RICO actions under S. 438.

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[1] As reported in the Wall Street Journal, March 28, 1989, page C1.

Who are those institutions? They are the mutual funds, the money market funds, the insurance companies, the pension funds, and so on, that individual investors rely upon so heavily for their participation in the marketplace. These institutional investors have the resources and expertise to diversify and best utilize the markets for their own interests and those of their investors. They are also most likely to be among the victims of marketplace fraud (because of the scope of their participation in the markets) and best suited and financed to take action against it.

Why cut off the treble damages RICO remedy to more than half the investment dollars on Wall Street? Why deny the remedy to those most likely to be in a position to pursue it? A direct result of institutional losses is individual investor losses. Is not the best deterrent against market frauds the availability of a treble damages remedy to the most prominent market participants with the real ability to pursue it?

In addition, in the settlement context, it has been observed that the settlement value of cases increases when the treble damages RICO remedy is available. As stated in American National Bank & Trust Co. of Chicago v. Haroco, Inc., 747 F.2d 384, n.16 (7th Cir. 1984), affirmed, 473, U.S. 606 (1985),

> . . . the delays, expense and uncertainties of litigation often compel plaintiffs to settle completely valid claims for a mere fraction of their value. By adding to the settlement value of such valid claims in certain cases already involving criminal conduct, RICO may arguably promote more complete satisfaction of plaintiffs claim without facilitating indefensible windfalls.

Therefore, the availability of treble damages greatly enhances the likelihood that in a settlement, an institutional investor, and thus the underlying individual investors, will obtain a recovery more approximating the actual damages incurred, nothing near true trebled damages and certainly not a windfall.

In the course of the RICO debate, many of the law's critics have argued that RICO was intended solely to combat the infiltration of legitimate businesses by "organized crime." We do not agree with that narrow construction, but even if arguendo this was the sole intent, even these detractors must agree that the "natural person" requirement is wholly contrary to the intent of RICO. Legitimate businesses would be denied the unique RICO remedy of treble damages (even if infiltrated by traditional "organized criminal" elements) if their victimization took the form of patterns of securities, mail or wire fraud.

RICO is intended to deter those who would engage in concerted, patterned, premeditated, criminal conduct. It stands to reason that the best means of achieving the goals of RICO are to make certain that those most able to pursue its remedies— be afforded the opportunity. Institutional participants in the financial marketplace must not be denied the treble damages remedies of RICO for injuries resulting from patterns of indictable securities, mail or wire fraud.

2. The State or Federal Securities or Commodities Law Exemption

Under S. 438 [at proposed Section 1964 (c)(2)(B)(iii)(II)], even a "natural person" prevailing plaintiff would be denied costs, attorneys fees and the opportunity to recover punitive damages up to twice the actual damages under RICO if any state or federal securities or commodities law makes available an express or implied remedy for the type of behavior on which the claim of the plaintiff is based. The proposal is rife with ambiguities.

To begin, the language does not specify which state. Therefore, under a literal reading of the provision, an Arizona plaintiff could not sue a New Mexico defendant under S. 438, even though neither federal nor Arizona nor New Mexico securities or commodities laws provided an express or implied remedy for the type of behavior on which the plaintiff's claim was based, if, for instance, Maine had a law on its books which did, because a state law provided a remedy! There is no requirement that the state which has such a law have any nexus to the transactions on which the suit is based.

Second, although federal and state and securities laws are fairly easy to identify, what is a "commodities law?" A "commodity" is defined in The American Heritage Dictionary (Second College Edition) as "Something that is useful or can be turned to commercial or other advantage. An article of trade or commerce, especially an agricultural or mining product, that can be transported." Again, a literal reading of S. 438 would produce the result that if any state or federal law involving either anything that can be turned to commercial or other advantage, or an article of trade or commerce, provides an express or implied remedy for the type of behavior on which the plaintiff's claim is based, there would be no RICO costs, fees and punitive damages remedy. The scope of the exemption could involve most of the laws of American jurisprudence.

Third, S. 438 does not specify to whom the express or implied remedy must be available. Numerous provisions of state and federal securities and "commodities" law provide "remedies" to the regulators and government alone. There is no private civil remedy. S. 438 would preclude a mail and wire fraud

RICO suit by private plaintiffs nonetheless. In discussing previous, but in this sense, identical bills, Senator Metzenbaum commented that it was his intent that the remedy had to be available to this plaintiff. Representative Boucher disagreed.

Fourth, and perhaps most vexing, is the "type of behavior" phrase. Securities and commodity futures and options laws contain anti-fraud provisions that prohibit not only traditional forms of deceit and misrepresentation, but also conduct which "would operate as a fraud or deceit," failures to disclose and the making of untrue statements even without a showing of intent to deceive. Under S. 438, would a bank depositor be precluded from bringing a suit for enhanced RICO damages against a bank president who embezzled millions from the bank because federal securities laws make it illegal to engage in that "type of behavior?"

More narrowly drawn, examine the case of International Gold Bullion Exchange (IGBE). In the early 1980s, through the Wall Street Journal and other newspapers, IGBE sold precious metals at below spot price to thousands of investors provided that the customers agreed not to take delivery for a year and allowed IGBE to store the bullion for them. Twenty-five thousand investors lost approximately $100 million. In congressional hearings, both the SEC and the CFTC testified that the IGBE arrangements were not within the jurisdiction of the statutes they administered. Nonetheless, it could be very strongly argued that under S. 438, since these statutes nonetheless provided a remedy for the "type of behavior" involved, a mail fraud RICO suit for enhanced remedies would not be available.

Taken as a whole, the securities and commodities law exemption is unacceptable. Is it not irresponsible of the RICO critics to replace what they have assailed as vague and overbroad with a provision so elusive as to virtually guarantee years of court struggle over definition? Many of these issues were raised in the discussions of S. 1523 and H.R. 2983 in 1987. They were ignored. The exemption was in no way modified in S. 438. The Report of the Senate Committee on the Judiciary[2] regarding S. 1523 dealt with at least some of the issues (at pages 17 and 18). While record of congressional intent is of great importance, it is no substitute for clear, precise and accurate draftsmanship in the first place. If there must be an exemption, it must be rewritten.

Adoption of this exemption would be a concession to the securities and commodities industries of monumental proportions. Have Wall Street and Chicago earned such a concession in the last few years? Clearly not. In fact, resource restrictions at the state and federal levels argue in favor of broader private remedies, not the opposite, and this is certainly so in the securities and commodities exchange fields. So often we regulators hear from industry that self-regulation is most efficient and desirable. Let the market regulate itself, we are told. Private civil actions are part and parcel of that self-regulation. Persons who engage in patterns of premeditated, carefully conceived and executed frauds are an undeniable part of that marketplace. They must be deterred with every available weapon, including treble damages under RICO.

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[2] Report 100-459, 100th Congress, Second Session, August 8, 1988.

3. The Punitive Damages Provision

Under S. 438, any person may sue for actual damages [proposed Section 1964 (c)(2)(A)]. To qualify for costs and attorneys fees, that person must be either a natural person, non-profit corporation, indenture trustee, pension fund or investment company suing for insider trading, or a natural person whose claim could not be construed as having a remedy under a state or federal securities or commodities law [proposed Section 1964 (c)(2)(B)]. If the person qualified for costs and attorneys fees, they would also have the opportunity to seek punitive damages of up to twice the actual damages [proposed Section 1964 (c)(2)(C)]. However, unlike the burden of proof for actual damages, a preponderance, the plaintiff would have to prove by clear and convincing evidence that the actions of the defendant were consciously malicious, or so egregious and deliberate that malice might be implied.

The most troubling aspect of the punitive damages formulation in S. 438 is found at proposed Section 1964(c)(4). This Section provides that there must be the equivalent of a second trial on the issue of punitive damages. Evidence relevant only to the amount of punitive damages is inadmissible in trial on actual damages unless the court allows its introduction on special motion. S. 1523 delineated factors to be considered by the court in a punitive damages determination:

* degree of defendant culpability;
* degree of disparity in bargaining position of defendant and plaintiff;
* history of similar conduct by the defendant;
* the benefits derived by the defendant from the illegal conduct;
* the number of persons victimized;
* prior governmental agency decisions against the defendant for this conduct, including a finding of bad faith;

- the deterrent value of any class action award as negating the need for punitive damages; and
- any other equitable factor in the view of the court.

To require bifurcation of hearings would unnecessarily prolong trials and further inhibit the ability of RICO plaintiffs to recover. It would likewise dilute the deterrent effect of private civil actions on patterns of indictable securities, mail and wire fraud. If triers of fact were capable of differentiating between actual and punitive damages under S. 1523, they should be capable of doing so in one hearing under S. 438 as well.

4. The Prior Conviction Provision

S. 438 preserves the treble damages, costs and attorneys fees provisions of RICO for plaintiffs suing a defendant convicted of a federal or state criminal offense [proposed Section 1964 (c)(5)]. However, the defendant's offense must be based upon "the same conduct" upon which the plaintiff's action is based. This flies in the face of the intent of RICO. A defendant with a long history of mail and securities fraud convictions could not be sued under this provision by the victims of his last, but as yet unprosecuted, fraud.

Supporters of RICO reform point to this proposal as their response to the criticism last year that their RICO amendment proposals constituted a "Boesky bailout bill." They suggest that by expanding the provision to include a much broader base of crimes than only RICO predicate offenses, they have fixed the bill to include Mr. Boesky's criminal violation of SEC filing requirements. However, those plaintiffs with very viable claims against Mr. Boesky under current RICO on file today could lose them tomorrow were this provision to be adopted because their actions (for instance, mail fraud on a misappropriation theory) are not based on the "same conduct" as the crime for which Boesky was convicted (failure to file information with the SEC).

Proposals for Rational RICO Reform

It should be difficult to establish a cause of action for investment fraud under RICO. Instances of enterprises engaging in patterns of indictable securities, mail or wire fraud are not commonplace. They are also, unfortunately, not as rare as we would like. The scope of harm to injured investors and market participants is enormous; the scope of harm to our markets and our economy in general is incalculable.

The essence of private civil RICO should be preserved. RICO can best be appropriately limited in its civil application by a limitation on the definition of "pattern," and such a limitation is pending before the Supreme Court in H.J., Inc. v. Northwestern Bell Telephone Co., 829 F. 2d 648 (8th Cir. 1987).

Further, any RICO reform should concentrate on procedural rather than substantive issues. Replacement of the treble damages provisions with a punitive damages model, perhaps requiring a showing of clear and convincing evidence, with preservation of costs and attorneys fees, would be a rational compromise, emphasizing the difficulty which should be imposed on plaintiffs in such serious matters but at the same time preserving the attractiveness and feasibility of proceeding with assured costs and attorneys fees upon prevailing.

As a final proposal in the general sense, perhaps a new procedural standard should be created -- civil probable cause. RICO is a structured blending of criminal and civil law. Many critics have argued that too many private civil RICO cases are merely standard commercial disputes with a RICO claim affixed for harassment purposes. RICO critics go on to argue that these claims survive even motions to dismiss because, theoretically, a cause of action has been pled with sufficiency. Requiring that a private plaintiff establish, in what would amount to a civil preliminary hearing, that there is probable cause to believe that an enterprise has been operated in a pattern of indictable securities, mail or wire fraud, and that the defendant is the one who committed the crimes, would provide a much broader basis for the court to dismiss inappropriate RICO suits. RICO involves criminal law concepts. Perhaps borrowing more from criminal procedure would limit the number of inappropriate cases.

As to S. 438, if the language and general format must be preserved, NASAA respectfully submits six specific recommendations for amendment.

First, the "natural person" limitation should be removed. Any person should be able to avail themselves of the private civil RICO remedies.

Second, the commodities law reference in the exemption should be redrafted to make it clear that only those transactions within the exclusive jurisdiction of the federal Commodity Exchange Act are exempted from enhanced RICO remedies coverage (if in fact a commodities exemption is called for at all).

Third, it should be clearly specified that the securities and commodities law exemption would apply only in those cases where an express or implied remedy is (or at one time was) available to the plaintiff who is suing.

Fourth, the "type of behavior" phrase should be eliminated. In an effort to make certain nothing was missed, the drafters of the exemption literally threw the baby out with the bathwater.

Fifth, all evidence should be admissable at one hearing. Clear and convincing evidence is not an unacceptable burden of proof for punitive damages, but it should be heard at one hearing. In addition, the limitation on twice the actual damages should be eliminated as an equitable trade-off.

Sixth, and finally, it should be made clear that in the prior conviction provision, the prior crimes need not have a nexus to the plaintiff's cause of action. It is rare enough that a plaintiff is injured by a person with a predicate offense conviction. It is rarer still that the injury arose from the conduct which formed the basis of the conviction. The goal of RICO is to deter patterns of crime. The nexus requirement seriously undermines that goal.

Conclusion

White collar crime in this nation is a crisis. It threatens to engulf us. We must finally recognize that a person who engages in a pattern of indictable securities, mail or wire fraud is a real crook. Who can recall when the stock market has so dominated the news and our everyday lives? Is there any question that our markets, financial institutions and professionals are suffering a major crisis of public confidence and trust? The public, the person on the street, would indeed be amazed and incredulous if they were to learn that Congress planned to drastically limit the sanctions which could be brought against financial criminals by private citizens and companies. This is no time to retreat.

The efforts to reform RICO have provided the forum for what amounts to a national debate on ethics in our financial markets. That debate represents a fundamental contest between members of the financial community on the one hand and government insisting they follow the rules established in the public interest on the other. It is a modern day Tale of Two Cities, with Washington imposing the laws, and some in New York (and apparently Chicago) defying them. Business tells the public "It is the best of times" while we warn "It is becoming the worst of times."

It has been reported that in response to the question, "How would you have acted if you knew you would be caught?," Ivan Boesky responded not that he wouldn't have done it, but that he would have been more careful! No law will ever eliminate fraud, but RICO certainly evens up the odds. We must make financial fraud's enormous profit potential not worth the risk of being caught. Private civil RICO is a major component of that effort.

PREPARED STATEMENT

OF

H. LADDIE MONTAGUE, JR.

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Before the Senate Judiciary Committee
Re: Civil RICO Reform, Senate Bill 438

June 7, 1989

STATEMENT OF

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I am thankful for the opportunity to present my views to this honorable Committee concerning proposed Bill 438, proposed amendments to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961, et. seq.

My comments will not be premised on the abstract, but on my twenty-six years of experience in private practice litigating complex protracted cases in the federal court system, mostly involving either antitrust violations or business frauds, and mostly but not entirely on behalf of plaintiffs.

My views are based upon the perception that we are now experiencing an environment in the market place where business ethics are often discarded in lieu of greed and that persons who abide by business ethics are economically injured by those who do not. We see as every day occurrences bribery, fraudulent investment manipulation, fraudulent misrepresentations as to products, bankruptcy fraud and other business frauds. The RICO statute, with its treble damage provision, is an incentive for private enforcement against such conduct and is a deterrent to the business community to put greed before ethics.

For effective private enforcement under RICO, incentives are necessary. Private litigation involving business fraud is extremely difficult, highly expensive and very risky. Proof of the pattern of predicate acts usually must come from the defendants or hostile third parties.

Particularly in business frauds, the tracing of the financial maneuvers by defendants, whether it be kickbacks and laundering of monies, the savings and loan industry, insider trading or the like, is very difficult. The perpetrators are usually sophisticated and take whatever steps they can to cover their tracks. Normally, defendants have greater resources than their victims and are represented by large and skilled law firms with resources to match. Thus, to undertake to prosecute a private claim for RICO is to undertake a very high risk. If private enforcement is desired, incentives for private enforcement are required. Treble damages provides that incentive.

The proposed amendments were no doubt fostered by cries that private plaintiffs were abusing the statute in alleging RICO violations. Assuming arguendo that there are some abuses, the answer is not to de-treble RICO or increase the burden of proof, taking away the incentive for private enforcement. It has never been a wise decision to throw the baby out with the bath water. To the extent a RICO violation has been committed, it should be subjected to the threat of treble damages.

I have been counsel in a case begun in May, 1983, which alleges a civil RICO violation and which I believe points out some of the inequities and undesirable features of S. 438. I represent the Trustee in Bankruptcy of a corporation (Frigitemp) who alleges that the corporation was forced to pay kickbacks to two key officers of a major shipbuilding company (Quincy Shipbuilding, a Division of General Dynamics) in order to be awarded subcontracts, that millions of dollars were embezzled from Frigitemp through phoney invoices and that those millions of dollars were laundered through a series of foreign bank accounts, the last of which were in Switzerland. When the Trustee in Bankruptcy first began investigating rumors of this scheme in 1980, he alleges that he was deceived by the scheme's perpetrators, through perjury and other means, into believing that no kickbacks had been paid, that the only wrongdoing was intra-corporate and as a result, the Trustee gave a release to the shipbuilding company and its two key executives. The Trustee in Bankruptcy thereafter discovered the kickbacks and commenced a RICO action. See Bernstein, Trustee in Bankruptcy v. IDT, et al., 638 F. Supp. 916 (S.D.N.Y. 1986). Four months after the Trustee commenced suit, the two key executives of General Dynamics were indicted along with two former Frigitemp officers. The indictment, among other things, alleged a RICO violation. The two General Dynamics executives (Messrs. Veliotis and Gilliland) fled the country, and remain fugitives from justice, having never been tried. One former Frigitemp officer pled guilty; the other (Davis) was tried and convicted of a RICO violation, which conviction was affirmed on appeal. 767 F.2d 1025 (2d Cir. 1985).

The United States also commenced a civil suit against the same criminal defendants. Subsequently, as a result of discovery obtained in the Trustee's case (which was set forth in publicly filed briefs), the Government included the shipbuilder, General Dynamics, as a defendant in its civil suit, which is still pending. The Trustee in Bankruptcy's suit is also still pending. It was ready for trial in June, 1987, but due to the untimely death of the presiding judge, Hon. Edwin Weinfeld (S.D.N.Y.), the case has not yet been tried. It is presently scheduled for trial in July, 1989.

I allude to the above case scenario in the context of certain of the proposed amendments presented in S. 438 to illustrate that their application is unjust and undesirable, whether applied prospectively or retroactively.

Now for specific comments:

A. It Is Arbitrary To Allow The Government To Sue For Treble Damages With A Burden Of Proof Being A "Preponderance Of The Evidence" And Not Giving Private Plaintiffs The Same Right.

The Bernstein v. I.D.T. case is a perfect example of the arbitrariness of the proposed amendments. Bernstein has alleged basically the same conduct under RICO as the United States has in its civil suit, yet the United States is rightfully able to recover treble damages under a burden of proof of "preponderance of the evidence." Bernstein will only recover single damages if: (1) he qualifies under the various grounds for up to treble actual damages and (2) if he proves his case by "clear and convincing evidence". Thus with the same party defendants and the same allegations of illegal conduct, the private plaintiff has a lesser incentive to litigate and a higher burden of proof. Yet in the Bernstein case, it was the discovery by the private plaintiff that influenced the United States to add General Dynamics as a defendant. Why should the private plaintiff be disadvantaged? Why should not the private plaintiff have an incentive to enforce RICO?

B. It Is Arbitrary To Allow A Private Plaintiff To Recover Treble Damages Only Against A Defendant Who Has Been "Convicted" Of Certain Federal Or State Offenses.

Again, the Bernstein case exemplifies the arbitrariness of this provision. In Bernstein, two defendants who were indicted fled the country, remain fugitives from justice and have never been tried. The one defendant who was tried was convicted of participating with the two fugitives from justice in a racketeering enterprise. See U.S. v. Davis, 767 F.2d 1025 (2d Cir. 1985). Why should fugitives from justice profit from their flight, especially when their cohort was convicted? Yet the proposed amendment seems to provide this unjust result.

What if a third party was not indicted as a result of prosecutorial discretion or because that party was granted immunity in order to gain evidence against others. A fairer treatment would be as follows: if the racketeering enterprise was found to exist in a criminal trial of one or more of the defendants associated with that enterprise, treble damages should be allowed against any defendant proven by a preponderance of the evidence in a civil case to have participated in that enterprise, as defined in the RICO statute.

What if a criminal defendant pleads guilty or nolo contendere? Is that the equivalent of a "conviction" under this proposed amendment? Or suppose a defendant bargains to plead guilty to a lesser offense or to an offense for which defendant's "state of mind" is not a "material element"? Should a defendant by his plea be able to disenfranchise a RICO victim of his right to treble damages? I think not.

A defendant who is indicted but is not acquitted or a defendant who is indicted but flees the jurisdiction to avoid trial should be liable for treble damages. Likewise a civil defendant, not named as a defendant in a related criminal proceeding in which a guilty verdict resulted or in which guilty or nolo pleas were accepted as to at least one defendant, should be liable for treble damages in a related civil case if his complicity is proven by a preponderance of the evidence.

C. At The Very Least, In Each Case, Treble Damages Should Be Left To The Jury

S. 438 sets forth a test to be considered by the trier of fact in determining whether up to treble damages should be awarded in those instances for which the proposed amendments allow up to treble damages.[1] While I urge treble damages be automatically allowed for all civil violations of the RICO statute, at the very least, it should be for the trier of fact to determine in each and every civil case if up to treble damages applies, and the tests set forth in S. 438 should be considered by the fact finder in making that determination. In this way, whether treble damages applies in each case will be determined by the trier of fact based upon the facts of that case and subject to the standards set forth in S. 438. In this way, the legislature is not burdened with the task of foreseeing each and every instance in which trebling is a proper incentive. And the private plaintiff can assess the strength of his own case to determine whether the incentives he desires in fact exist.

D. The "Retroactivity" Provision Of S. 438 Is Unfair And Will Cause Undesirable Results

S. 438 provides for retroactive application to many pending cases. Aside from the basic unfairness of retroactivity, its application is both arbitrary and unworkable. For example, it will not apply to cases where there has been a jury verdict or district court judgment. S. 438, §8(a)(2)(A). However, this prejudices those parties whose cases are pending in a district with a slower docket and whose case may be ready for trial but will not be reached as early as a case which is ready for trial at a later time but is reached for trial earlier because it is pending in a district with a faster docket. One case incurs retroactivity, the other does not.

More importantly, how will retroactivity work where the discovery proceedings have been concluded in a pending case? S. 438 makes certain facts relevant which were not or may not have been relevant before it's passage. For example, to obtain "punitive damages"[2] S. 483, §4, requires discovery of facts which might otherwise not have been the subject of discovery. Is the plaintiff who is saddled with retroactivity to be denied discovery and thus proof on these matters? Or is discovery to be opened, further delaying when plaintiff will go to trial and adding litigation expenses. The same is true with respect to the newly added defense of "good faith". S. 438, §4(C)(7). This section introduces a whole new concept with many tangential issues, all of which will require new discovery, new expense, and new delay.

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[1] Whether "the defendant's actions were consciously malicious, or so egregious and deliberate that malice may be implied. S. 438, §4(B)(2)(c).

The unfairness of retroactivity is evident. RICO cases generally are protracted in nature. They require extensive and prolonged discovery and involve substantial pretrial briefing and skirmishing. These cases were initially undertaken and the efforts and expenses incurred on Congress' word that there were to be incentives to the successful plaintiff -- treble damages. Now, after justifiable reliance on Congress' word and after expenditure of substantial efforts and funds, those incentives are pulled away, while the high expenses and high risks of RICO litigation remain. The civil common law has an answer to that kind of conduct -- "promissory estoppel" or "equitable estoppel" -- and no person, natural or otherwise, could get away with that conduct in the real world.

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[2] Indeed, it is a misnomer to call a provision "punitive damages" which limits punitive damages up to treble actual damages. Under common law, there is no such limit on punitive damages.

E. Mixed Burden Of Proof -- "Preponderance Of The Evidence" For The Underlying Violation And "Clear And Convincing Evidence" Up To For Doubling Damages -- Is Unnecessarily Confusing To A Jury

The proposed amendments require a trier of fact to analyze the same facts under two separate and distinct burdens of proof.[3] While this may be a manageable task where the trier of fact is a judge, it will become a confusing task for a jury. The concept of burden of proof is difficult at best. If the same jury must apply the concepts of "preponderance of the evidence" and "clear and convincing evidence" to the same set of facts, confusion is likely to result. The fact that a RICO violation usually involves a complex and extensive factual setting only compounds this confusion. I therefore recommend that the traditional burden of proof in civil cases -- preponderance of the evidence -- apply across-the-board for all determinations by the fact finder.

CONCLUSION

Having spent twenty-six years litigating private civil complex and protracted cases, I am aware of the degree of difficulty and the high risks, as well as the high costs, a plaintiff encounters in such litigation. As you do, I believe the private enforcement of RICO is an effective enforcement tool. I hate to see it emasculated because along the way it may have, in some instances, been abused. Every new law, as it matures over time, has been tested to apply to various situations. It is this dynamic that makes our judicial system so effective. Whatever abuses may have been attempted do not merit the limitations on RICO set forth in the proposed amendments. Those amendments actually undercut the fight against white collar crimes and sophisticated fraud schemes which are all too prevalent today. I hope that this

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[3] For the convenience of this Committee, annexed hereto as Appendix "A" and "B" respectively are the proposed charges to the jury for "preponderance of the evidence" and "clear and convincing evidence" as set forth in Modern Federal Jury Instructions.

Committee, in its wisdom, decides to leave RICO as it is, allowing the courts to continue their development of its application. Alternatively, I hope that the foregoing comments temper the extensive amendments contemplated by S. 438 so that private enforcement of RICO ramains a reality and grows as an effective deterrent to unwanted conduct.

Thank you.

H. Laddie Montague, Jr.

June 7, 1989

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Instruction 73–2

Burden of Proof—Preponderance of the Evidence[1]

The party with the burden of proof on any given issue has the burden of proving every disputed element of his claim to you by a preponderance of the evidence. If you conclude that the party bearing the burden of proof has failed to establish his claim by a preponderance of the evidence, you must decide against him on the issue you are considering.

What does a "preponderance of evidence" mean? To establish a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a claim has been proved by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

If you find that the credible evidence on a given issue is evenly divided between the parties—that it is equally probable that one side is right as it is that the other side is right—then you must decide that issue against the party having this burden of proof. That is because the party bearing this burden must prove more than simple equality of evidence—he must prove the element at issue by a preponderance of the evidence. On the other hand, the party with this burden of proof need prove no more than a preponderance. So long as you find that the scales tip, however slightly, in favor of the party with this burden of proof—that what the party claims is more likely true than not true—then that element will have been proved by a preponderance of evidence.

Some of you may have heard of proof beyond a reasonable doubt, which is the proper standard of proof in a criminal trial.

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[1] Adapted from the charge of the Hon. Abraham Sofaer in Sharon v. Time, Inc., 83 Civ. 4660 (S.D.N.Y. 1985).

APPENDIX "A"

That requirement does not apply to a civil case such as this and you should put it out of your mind.

Authority

Second Circuit: Larson v. JoAnn Cab Corp., 209 F.2d 929 (2d Cir. 1954).

Third Circuit: Porter v. American Export Lines, Inc., 387 F.2d 409 (3d Cir. 1968); Virgin Islands Labor Union v. Caribe Construction Co., 343 F.2d 364 (3d Cir. 1965); Burch v. Reading Co., 240 F.2d 574 (3d Cir.), *cert. denied*, 353 U.S. 965 (1957).

Fifth Circuit: Gardner v. Wilkinson, 643 F.2d 1135 (5th Cir. 1981).

Sixth Circuit: Disner v. Westinghouse Electric Corp., 726 F.2d 1106 (6th Cir. 1984); Toledo, St. L. & W. R. Co., v. Kountz, 168 F. 832 (6th Cir. 1909).

Comment

The standard of proof used in federal civil actions has constitutional dimensions,[2] finding its roots in the fifth amendment of the Constitution of the United States, which forbids any person to "be deprived of life, liberty, or property without due process of law." The standard of proof used to guide a jury's decision is an element of the due process requirement.[3]

There are, roughly, three standards of proof. These can be described as ranging along a "continuum"[4] and representing

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[2] *See* Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); Celanese Corp. of America v. Vandalia Warehouse Corp., 424 F.2d 1176 (7th Cir. 1970).

[3] *See* Addington v. Texas, 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

[4] Addington v. Texas, 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). *See also* United States v. Fatico, 458 F. Supp. 388, 403 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980).

Instruction 73-3

Burden of Proof—Clear and Convincing Evidence[1]

The party with the burden of proof on (the issue of ________) has the burden of proving all of the elements of his claim on that issue to you by clear and convincing evidence. If you conclude that the party bearing the burden of proof has failed to establish his claim by clear and convincing evidence, you must decide against him on the issue you are considering.

What does "clear and convincing evidence" mean? Clear and convincing evidence is a more exacting standard than proof by a preponderance of the evidence, where you need believe only that a party's claim is more likely true than not true. On the other hand, "clear and convincing" proof is not as high a standard as the burden of proof applied in criminal cases, which is proof beyond a reasonable doubt.

Clear and convincing proof leaves no substantial doubt in your mind. It is proof that establishes in your mind, not only the proposition at issue is probable, but also that it is highly probable. It is enough if the party with the burden of proof establishes his claim beyond any "substantial doubt"; he does not have to dispel every "reasonable doubt."

(*If preponderance of evidence is not also charged, add*: It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a claim has been proved by clear and convincing evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.)

Authority

United States Supreme Court: Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

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[1] Adapted from the charge of the Hon. Abraham Sofaer in Sharon v. Time, Inc., 83 Civ. 4660 (S.D.N.Y. 1985).

APPENDIX "B"

Senator DeConcini. We will also insert in the record a letter from Steve Towne, of Fort Worth, TX, to the chairman of the committee, Senator Biden.

[Information follows:]

Steve Towne
1905 Dakar Rd West
Fort Worth, Texas 76116
May 25, 1989

Ed Baxter
c/o The Honorable Dennis DeConcini
Washington, D.C. 20510

Dear Ed,

As per our phone conversation yesterday, I am formally requesting that my May 2, 1989 letter to Senator Biden (see enclosed copy), which outlined a severe problem in RICO reform bill S. 438, be made part of the record of the June 7, 1989 hearing on S. 438. Thank you.

Very truly yours,

Steve Towne

Steve Towne
1905 Dakar Rd West
Fort Worth, Texas 76116
May 2, 1989

The Honorable Joseph Biden
Chairman, Senate Judiciary Committee
224 SDOB
Washington, D.C. 20510

Re: S. 438

Dear Senator Biden:

I understand that your committee will soon consider amendments to civil RICO. I am writing because I have grave concerns about the effect of the recently introduced Boucher-DeConcinci bill on the ability of victims of sophisticated crimes to recover from the criminals and about the effect on deterring future crimes. I would very much appreciate the opportunity to testify before your committee on my experiences with criminal fraud and civil RICO.

I am a CPA by profession and a real estate investor on the side. I presently have a civil RICO in Federal court, where I am trying to recover a huge sum of money that I was defrauded out of in a land syndication. I have first hand experience in the problems that will be created by the proposed amendments to civil RICO.

On December 8, 1988, I wrote you a letter regarding my concerns of S. 1523. Although S. 438 is moderately improved, I still see substantial problems in it.

I see a potentially huge hole in the proposed RICO reform bill S. 438 which at the very least will bottleneck the courts with judicial interpretation and at the most could render civil RICO virtually useless to most victims. Sec 1964(c)(4), which limits the use of evidence relevant only to the amount of punitive damages prior to affixing liability, could be interpreted so that liability is precluded from ever being affixed in the first place, thereby making recovery under civil RICO all but impossible. Under this amendment, the argument can and will be made that predicate acts not directly effecting the plaintiff are relevant only to establishment of punitive damages under Sec 1964(c)(2)(C) ("punitive damages up to twice the actual damages if the plaintiff may collect costs under the provisions of subparagraph (B) of this paragraph, and the plaintiff proves by clear and convincing evidence that the defendant's actions were consciously malicious, or so egregious and deliberate that malice may be implied"). If these predicate acts against unrelated victims are deemed only relevant to the establishment of the amount of punitive damages, then amended Sec 1964(c)(4) says it can't be introduced in establishing liability under 1964(c) in the first place ("In an action under this subsection, evidence relevant only to the amount of punitive damages shall not be introduced until after a finding of liability.....") The bottom line is a nongovernment plaintiff in a civil RICO case will be unable to ever establish liability under Sec 1964(c) in the first place.

This will be the result, because to establish ' a pattern of unlawful activity' under Sec 1964(c), a series of predicate acts must be linked together to demonstrate a pattern. For an act to be established as a predicate act, even in a civil RICO case, criminal intent (as opposed to mistaken judgement) must be established. If a conspiracy is alleged, the existence of a conspiratorial agreement will need to be established. Any U S attorney or district attorney will tell you these are very difficult elements to prove, particularly when you are precluded from introducing evidence of recurring and continued criminal activity against various victims. While for civil RICO these elements need only be proven by 'preponderance of evidence' rather than 'beyond a reasonable doubt', the restriction of the evidence that can be introduced will deal civil RICO a death blow.

The predicate acts of mail or wire fraud are usually the basis of most white collar civil RICO suits. In order to prove mail or wire fraud, one must demonstrate a scheme to defraud and the use of the mails or wires in its execution. Demonstrating a scheme to defraud is much more difficult when restricted to evidence of a scheme worked but once.

RICO activities are usually conspiratorial in nature, since two or more perpetrators of unlawful activity are generally working in concert for illicit financial gain. Historically, conspiratorial agreements have been proven by circumstantial evidence. This is because it is highly unusual for conspirators to leave written or other other evidence lying around as to their conspiratorial agreement. In the absence of written proof of a conspiratorial agreement, courts have ruled that a conspiratorial agreement can be inferred in situations where individuals are common participants of an illicit scheme worked repeatedly.

The element of circumstantial evidence is of no use in proving RICO under the amended law if one is not allowed to show where the scheme has been worked before. Doubt as to criminal motive is inevitable where only evidence of a scheme worked once is allowed. Doubt is removed, however, when a jury is allowed to see the same scheme worked again and again.

On March 29, 1989, the United States Department of Justice issued a 110 page, 98 count indictment against Michael Milken, Lowell Milken, and Bruce Newberg. The reason the government seeks to prove so many predicate acts is not for want of things to do. It is precisely because the more times a particular fraudulent act is demonstrated, the more likely the inference that there was a conspiratorial agreement and that criminal intent was present.

Civil RICO makes it unlawful to operate a business through a 'pattern of unlawful activity'. Pattern by any interpretation is a recurring activity. If you are required to prove that the defendant operated a business through a pattern of unlawful activity, but are precluded from introducing evidence of this recurring activity, you have an impossible situation. It is the classic paradox of charging someone with the responsibilty for something, but failing to give him the authority or means to carry it out.

Predicate crimes, which are linked together to form the pattern of unlawful activity under RICO have always been separate causes of actions to the extent the plaintiff could demonstrate financial injury. Civil RICO made it a separate crime for a group of people to get together and engage in systematic crimes for financial gain. RICO recognized that there was something heinous about individuals banding together to defraud others. One person engaging in one fraud was bad, but for individuals to get together with others and make a business of systematic financial pillaging was far worse.

The recognition of this reality, however, is of no value if a victim can not use the evidence of the systematic business crimes to prove the pattern of unlawful activity element. It is analogous to proving a defendant engaged in a pattern of murder, where a victim could only introduce evidence of murders directly injuring him in proving the pattern of murder. No matter how onerous the repercussions of engaging in a pattern of murder may be, liability will never be established.

The advantage of civil RICO in its present construction over causes of actions based upon the individual predicate crimes, is that if defendants were the perpetrator of multiple crimes and it can be proven, there is less doubt that the defendants are truly guilty of the alleged crimes. Under historical conspiracy interpretation, this is a valid assumption.

It seems ironic to me that in light of the exposed frauds of the Milkens, of Ivan Boesky, of E F Hutton and their check kiting scheme, and of the Chicago Mercantile Exchange, that preasure is being put on to take the teeth out of civil RICO. Are we saying, these frauds aren't really so bad?

Proponents of RICO reform would have you believe that plaintiffs are "extorting" settlements out of innocent businessmen. My question is, if the businessment are innocent, why are they afraid to go to trial? In light of the extreme prejudice against civil RICO cases in the lower courts, there should be no reason for innocent businessmen to fear. And if they are guilty, they need to suffer the consequences.

If, on the other hand, perpetrators of Sec 1964(c) crimes are not subjected to potential exposure of their systematic crimes, there is less of a deterrent to organized frauds. The intelligent white collar criminal will realize the important thing is to never defraud the same victim more than once.

In closing, I would like to reiterate that I would be very interested in testifying before your committee concerning my experiences with civil RICO in a sophisticated scheme. I believe I can give you some rare insight due to my background as a CPA and my first hand experience in prosecuting a civil RICO case. Please call me at (817) 763-8711 or write me as to a date for testifying.

Very truly yours,

Steve Towne

Steve Towne

Senator DeConcini. The committee will stand in recess, subject to the call of the chair. Thank you.

[Whereupon, at 1:06 p.m., the committee was adjourned.]

APPENDIX

PREPARED STATEMENT

OF

JAMES T. CORCORAN

VICE PRESIDENT - GOVERNMENT AFFAIRS

THE GREYHOUND CORPORATION

Before the

SENATE COMMITTEE ON THE JUDICIARY

WEDNESDAY, JUNE 7, 1989

STATEMENT OF

JAMES T. CORCORAN
VICE PRESIDENT - GOVERNMENT AFFAIRS

THE GREYHOUND CORPORATION

MR. CHAIRMAN AND MEMBERS OF THE JUDICIARY COMMITTEE:

My name is James T. Corcoran. I am Vice President of The Greyhound Corporation. The thrust of my testimony today is that civil RICO has been a valuable legal tool that has been used by many plaintiffs, including many reputable corporations, to attack increasingly sophisticated forms of interstate business crime. In recent years, we have seen many forms of such wrongdoing involving commodities, insider and other trading abuses, commercial bribery and financial fraud. These new forms of organized white-collar crime have preyed in part upon financially oriented businesses such as insurance companies, finance companies and insured financial institutions and have injured the integrity of our economic system just as the organized crime that was cited long ago by the Kefauver Commission.

Much has been written about alleged "abuses" of RICO, especially in the context of commercial litigation. If one credited these charges, one would conclude that the federal courts are choked with thousands of civil RICO suits, brought without any merit. That's not correct. The facts indicate that RICO has been used by some of the nation's most respected and responsible corporations to combat new and increasingly sophisticated forms of economic crime. They accepted Congress' invitation to act as private attorneys general relying on the promise of a recovery of treble damages if they are successful. In reality, the possible recovery of treble damages is only likely to partially compensate plaintiffs acting as private attorneys general for innumerable unreimbursed expenses and other burdens imposed upon plaintiff-victims in such cases.

I recognize that RICO is far from perfect and deserves scrutiny for possible revision. Nevertheless, "reform" that would retroactively eliminate treble damages for corporate RICO plaintiffs, such as that proposed, would unwisely and unfairly take away the effectiveness of RICO. "Reform" that would retroactively and discriminatorily eviscerate RICO should be rejected in favor of more moderate and prospective measures intended to correct for the future problems that have become identified.

Specifically, I would urge the Committee to oppose any reform that would effectively eliminate the availability of a treble damage recovery to corporate plaintiffs while continuing to make them liable for such recovery, and to reject any attempt to apply such "reform" retroactively, which would only take away matured rights, defeating the legitimate expectations of RICO plaintiffs and principally benefiting collusive wrongdoers.

CONGRESS SHOULD AVOID DISCRIMINATORY REFORM, REFRAIN FROM UNDERCUTTING THE COMMENDABLE USE OF RICO AND FOCUS ON TARGETED PROSPECTIVE REMEDIES TO REAL PROBLEMS

Rather than attack abuses, S.438 and H.R. 1046 discriminate against corporate victims of fraud. These bills are mistakenly premised on the belief that RICO is being abused by every plaintiff --largely because of its treble damage provision -- and blindly cut back on both the scope of RICO and its efficacy. Such reforms might reduce the volume of RICO cases, but at the unacceptable expense of retroactively jeopardizing worthy RICO actions and immunizing wrongdoers from the consequences of their acts. More targeted responses are the correct direction for RICO reforms.

Advocates of RICO reform have carefully selected the language they use, to portray RICO as a statute which in the hands of public prosecutors and private litigants has gone wildly astray. Thus, they claim that RICO has been used "coercively" against "legitimate businesses" for what they consider to be "garden variety business and contractual disputes." These charges are misleading; the truth is that RICO, as related to many cases brought by commercial enterprises in their capacity of private attorneys general, has served the original purposes for which it was adopted. Real RICO reform begins with an appreciation of the appropriate use that has been made of RICO, not with an attempt to gut RICO in ways that would principally benefit partners in crime. RICO is no different than any other law that has been the subject of attempted abuse and frivolous claims. However, the courts have dealt well with such attempts. Many of the examples cited are cases that have already been dismissed by the courts. The issue now is not very different from the one that Congress considered when it adopted RICO - how can our economy be protected from the ravages of organized and systematic crime and fraud in their constantly shifting means and forms.

The authors of RICO decided against limiting it to a tool to be used solely against drug dealers and mobsters. On the contrary, from its earliest times, RICO was envisioned as a needed approach to combat new and expanding forms of interstate fraud. Thus, in enacting RICO, Congress found that "organized crime" is a "highly sophisticated, diversified, and wide spread activity" that siphons off "billions of dollars" from our economy annually "by unlawful conduct" and other wrongdoing, including "fraud, and corruption." 84 Stat. 922 (1970). Indeed, with foresight, Congress astutely identified the broad economic impact of the kind of organized economic crime that RICO was meant to attack:

> Organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens . . .

Id. (emphasis added).

Indeed, as if anticipating the arguments now advanced by advocates of RICO reform, Senator McClellan, RICO Senate Sponsor, urged that RICO's broad scope was essential:

> The curious objection has been raised to S.30 as a whole, and to several of its provisions in particular, that they are not somehow limited to organized crime itself . . . as if organized crime were a precise and operative legal concept like murder, rape, or robbery. Actually, of course, it is a functional concept, like white collar crime, serving simply as a short-hand method of referring to a large and varying group of criminal offenses committed in diverse circumstances.

116 Cong. Rec. 18,913 (1970) (emphasis added).

Nor did Congress decide to limit RICO to a particular class of victims or wrongdoers. Responding to charges that RICO was not limited to traditional "organized crime," Senator McClellan replied that "[i]t is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well." 116 Cong. Rec. at 18, 940. Similarly, Congressman Poff, RICO's sponsor in the House, stated in response to a question why RICO contained no definition of "organized crime" that an easy definition was neither possible nor desirable.

> [I]t is probably impossible precisely and definitely to define organized crime. But if it were possible, I asked my friend, would he not be the first to object that in criminal

> law we establish procedures which would be applicable to only a certain type of defendant?

116 Cong. Rec. 35,204 (1970). The courts concur that RICO does not apply "only to organized crime in the classic 'mobster' sense." U.S. v. Grande, 620 F.2d 1026, 1030 (4th Cir.), cert. denied, 449 U.S. 830 (1980). As the U.S. Supreme Court explained, "legitimate" businesses "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985).

The history of RICO, in both criminal and civil actions, has demonstrated its unique ability to attack a variety of serious business crimes. Just recently, RICO's impact was demonstrated in the prosecution of Drexel Burnham Lambert, which was accused by government prosecutors of complicity in criminal securities activities. In connection with its agreement to plead guilty to these charges, Drexel will pay $650 million in penalties. It was the threat of RICO that brought this powerful firm to terms and enabled the Department of Justice to obtain a record settlement without the depletion of its limited resources. RICO charges since have been brought against Michael Miliken, a leading force in the junk bond market, on charges that he used illegal inside information about merger proposals to arrange deals and to manipulate stock. RICO may also figure prominently in investigations into unlawful trading on commodities markets in Chicago.

No doubt, RICO can also prove effective as a tool to halt or to attack financial institution fraud which may have contributed greatly to the present savings and loan crisis. A recent General Accounting Office report shows that fraudulent behavior has resulted in the failure of a significant number of savings and loan institutions. Congress and the Administration have spent six months working on a proposed legislative cure, and the Administration has sought a special fund to prosecute these cases. Many of the cases pending in the courts today based on RICO were brought by or on behalf of savings and loan associations. Relatedly, the FBI has 8,000 financial institution matters under investigation, which involve allegations of criminal conduct by officers and directors of financial institutions. Cash-intensive financial institutions, insurance companies and credit companies make tempting targets for the sort of economic crime that RICO has proven adept at curbing. It would be strange and nonsensical for Congress suddenly to diminish the ability of private corporations and public regulators to act upon such fraud at a time when such a tool is most immediately needed.*

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* On June 14, 1989, the New York Times reported that:

> "A third of all investigations of fraud at big financial institutions are not being pursued because the Justice Department lacks resources, Attorney

These are hardly "garden variety business and contractual disputes," as RICO's opponents would have Congress believe. On the contrary, they represent enormous and pernicious abuses of economic power which directly result in financial loss to hundreds, perhaps thousands, of Americans. A business is injured just as much when its property is stolen by sophisticated and non-violent methods by persons with college degrees, as when it is stolen by force or threats by persons who were educated on the streets.

ALLEGED RICO ABUSES HAVE BEEN OVERSTATED

The objective of reform should be to help the courts in separating the wheat from the chaff, instead of throwing the baby out with the bath water. Contrary to the allegations made by RICO's opponents, RICO cases are not flooding the Federal dockets. In fact, RICO filings have started to drop. According to the Administrative Office of the United States Courts, 949 Civil RICO cases were filed in Federal courts last year -- down more than 13 percent in one year from the 1,095 cases filed in 1987.* RICO cases are also slipping as a percentage of the total

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General Dick Thornburgh said today.

Mr. Thornburgh told the Dallas Bank Fraud Task Force that a recent survey indicates there are 8,343 investigations related to such fraud pending to various United States Attorneys' offices, with 4,000 classified as 'major bank fraud.'"

* Statistics obtained telephonically from the Administrative

Federal case load, from 0.45 percent of the 238,982 Federal civil lawsuits filed in 1987 to less than 0.40 percent of the 240,232 Federal civil lawsuits filed in 1988. Clearly, the word is getting out that the Federal courts will not tolerate meritless RICO actions. Congress should not attempt now to override the self-regulating discipline imposed by the Federal courts. In fact, the courts have addressed the distinction between ordinary business and commercial disputes and conduct that constitutes serious interstate fraudulent behavior and have dismissed many such ordinary disputes. However, they have not been tolerant of fraud. The courts have not separated out any kind of fraud as an acceptable "garden variety." Hopefully, Congress can constructively address any concerns in this regard without weakening the efforts to deter and remedy organized and systematic interstate fraud or interfering with or taking sides in any pending litigation.

RETROACTIVE ELIMINATION OF TREBLE DAMAGES IS GROSSLY UNFAIR

The proposed legislation seeks to eliminate treble damages for most private plaintiffs, including private business corporations which have been the victim of economic crimes. Apparently these "reforms" are motivated by the belief that the availability of treble damages in RICO actions has served chiefly as a lure for meritless actions brought by unprincipled attorneys. In fact, the treble damage provision has been an

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Office of the U.S. Courts.

incentive to pursue convicted criminals, their confederates and their associates. Far from eliminating the abuse, the proposals to limit treble damages for corporate plaintiffs are diametrically opposed to RICO's purpose and Congress' original intent in providing that relief.

First, treble damages were provided to adequately compensate victims of RICO violations and to forcefully deter wrongdoers. "Actual damages" do not begin to compensate victims. The decision to bring suit, with all of the potential costs, delays, and annoyances that it entails, is an economic one. A party who is limited to its actual damages, despite significant injury, may decide that litigation is simply not worth the cost and risk. In such cases, even a truly injured plaintiff may decide to settle for a fraction of its real injury or may forbear from bringing an action altogether. The only beneficiary of this kind of RICO "reform" would be the violator, who would be encouraged to continue his lawless activities. Indeed, a potential violator, knowing that his conduct would, at most, cause him to disgorge the fruits of his misdeeds, may decide that the immediate benefit of reaping an unlawful profit today easily exceeds the potential harm of having to disgorge some or all of that profit at a (probably much) later date. Where, however, treble damages are available, the downside risk increases enormously and will deter would-be violators. If current treble damages have any deterrence value, elimination of that relief will at best encourage additional illegal conduct. At a time of increased national concern about the pervasiveness of crime in our society, it seems perverse that Congress would now contemplate a reform whose chief beneficiary will be the criminal class itself.

A critical justification for treble damages is the important contribution they have made to RICO enforcement by encouraging victims to litigate their claims. The inducement of treble damages has encouraged the supplementation of the limited resources of government prosecutors. Instead of riding on their coattails, private attorneys general frequently have made the prosecutor's job easier. For many reasons, adequate enforcement resources may not be available for public prosecutors.

As state and local law officials such as the National Association of Insurance Commissioners make clear, Congress intended in 1970 to supplement the efforts of public prosecutors:

> The intent was to offer a justified enticement to the private sector to assume some of the burden that had previously been borne exclusively by government attorneys, to fight the growing presence of crime and criminal activity in the American business community. Such a public policy of saving valuable and expensive government legal time and talents as a result of private RICO actions financed from non-government sources deserves as much support today as it received when both the Senate and House incorporated it as part of the RICO bill 20 years ago.

Oral Testimony of Hon. Jim Long, Commissioner of Insurance, State of North Carolina, on behalf of the National Association of Insurance Commissioners before the Subcommittee on Crime, Committee on the Judiciary, U.S. House of Representatives (May 1989).

Large corporations are especially suitable candidates to act as private attorneys general. They have the resources and skills to engage in investigation and difficult litigation. Moreover, their actions seek out all persons engaging in or aiding and abetting predicate acts subject to RICO sanctions. At a time when governmental enforcement budgets are strained at all levels, it makes no sense whatsoever to undercut the resources private corporate attorneys general bring to bear on interstate wrongdoing under RICO.

RETROACTIVE RICO REFORM IS UNFAIR, UNWISE AND UNAMERICAN

In both S.438 and H.R. 1046, there are provisions regarding retroactive elimination of treble damages. If the elimination is made retroactive, victims of organized white-collar crime who brought suit in reliance on the expectation that, if successful, they will receive treble damages, instead may well be limited to compensatory damages only, which, in reality, do not even make plaintiffs whole. If discriminatory elimination of treble damages generally is unwise, retroactive elimination of treble damages is even more misguided and fundamentally unfair.

As a matter of general principle, Congress should abstain from retroactive revisions of the law, except in cases of great emergency. Retroactive laws, although passed from time to time, run counter to the traditional legislative rule of making laws that sanction or penalize only future conduct. In the earliest days of our republic, James Madison, one of the principal architects of the Constitution, observed that retroactive laws are "contrary to the first principles of the social compact and to every principle of sound legislation." The Federalist, No. 44. Retroactivity is objectionable because it negates antecedent rights between private parties, places a heavy hand on the scales of justice in pending litigation to alter the outcome to the benefit of one side and the detriment of the other and discriminates between different kinds of claimants based on their legal status.

Retroactivity if applied would, without good cause, dramatically, harmfully and discriminatorily take away accrued rights and defeat the legitimate expectations of RICO plaintiffs and renege on the promise made by Congress in enacting RICO. It would do so after many plaintiffs have devoted considerable time, effort and money to the prosecution of their cases, been diverted from other activities and suffered the inconvenience, burden and aggravation of extensive litigation, all in reliance on the word of Congress and the request that they serve as private attorneys general. It is an unwarranted exercise of legislative power that undermines with the stroke of a pen the hard work, expense, matured rights and legitimate expectations of many RICO plaintiffs without regard to the merit of their actions.

Moreover, retroactivity strikes at the heart of the important role of private attorneys general in enforcing RICO. As treble damages, if provided, encourage victims to bring suit, retroactive elimination of that provision undoubtedly will curtail or terminate even the most meritorious litigation. Indeed, it is difficult to identify anyone who will affirmatively benefit from retroactivity, other than the wrongdoers who either have or may be shown to have committed criminal predicate acts. The settlement bargaining position of such wrongdoers will instantly improve and at the very least, they will obtain a windfall in the form of retained money they would otherwise be forced to pay RICO victims.

Nor is this the concern solely of private litigants. Officials representing numerous public authorities concur that the retroactive elimination of treble damages would unfairly disrupt and circumvent the expectations of private litigants and the promises made to them by Congress when RICO was originally passed. In earlier testimony before the House Subcommittee on

Crime on H.R. 1046, the House counterpart to this bill, the Justice Department unequivocally stated that it is "opposed to the provision ... that would make limitations on private suits retroactive in some cases," an approach which, the Justice Department recognized, does not comport "with the American tradition of fair treatment for all litigants." Statement of John C. Keeney, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, before the Subcommittee on Crime, Committee on the Judiciary, U.S. House of Representatives (May 4, 1989) at 22. Similarly, the National Association of Attorneys General labeled the elimination of treble damages as "deeply disturbing" and said that "[t]he obvious effect of this provision is to reduce the liability of defendants currently under suit" and "to unfairly reduce the damages for the victims who have brought suit in reliance on the promise of federal RICO." Statement of Steven J. Twist, Chief Assistant Attorney General, Arizona Attorney General's Office, on behalf of the National Association of Attorneys General, Subcommittee on Crime, Committee on the Judiciary of the U.S. House of Representatives (May 4, 1989) at 12. The National Association of Insurance Commissioners also objected to having the "'rules of the game' being changed" in such a way that the benefits of recovery from the litigation are reduced after suit is filed. Oral Testimony of Hon. Jim Long, Commissioner of Insurance, State of North Carolina, on behalf of the National Association of Insurance Commissioners, Subcommittee on Crime, Committee on the Judiciary, U.S. House of Representatives (May 1989). As Commissioner Long explained, "the only beneficiary of such retroactive action [is] the defendants in these actions; persons, who you may assume, we do not feel are very worthy of such a potential congressional 'gift'."

CONCLUSION

In closing, let us summarize that RICO was, from the start, intended to attack a variety of forms of sophisticated, organized criminal conduct. RICO has become a valuable tool for corporations to attack the rising tide of organized white-collar crime, which posed the same kinds of threat to our economy that led Congress to enact RICO initially. Congress should not turn its back on those who have served its purposes and cast them aside in favor of those who are or may be shown to be wrongdoers. Those who have taken on the mantle of private attorneys general and devoted themselves to the mission Congress asked them to take on should be encouraged and accorded their full rights and not have them taken away as they near the goal Congress asked them to reach.

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National Association of Criminal Defense Lawyers

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June 7, 1989

The Honorable Dennis DeConcini
Chairman, Subcommittee on Patents, Copyrights
and Trademarks
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator DeConcini:

I am writing regarding today's Senate Judiciary Committee hearing, chaired by you, on the subject of civil RICO reform.

NACDL believes that civil RICO reform should not be undertaken in isolation, but should be considered together with the need for reform on the criminal side as well. Nevertheless, we understand that due to time pressures, today's hearing will focus solely on the civil side, and that it may not be possible to schedule a separate hearing on criminal RICO issues in the near future.

Accordingly, at the suggestion of Committee staff, we are submitting for the written hearing record the enclosed statement of NACDL's views on the compelling need for criminal RICO reform.

We hope that the Committee will be able in the future to explore these issues more throroughly, and to invite the further testimony of Mr. Buffone and Mr. Reed, two of the country's leading experts on criminal RICO issues.

In the interim, however, we respectfully request that our statement and this letter appear in the hearing record which is published for distribution to the members of the Committee.

Your kind attention to this request is greatly appreciated.

Sincerely,

H. Scott Wallace

H. Scott Wallace
Legislative Director

COMMENTS OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ON THE RICO REFORM ACT OF 1989

This statement is submitted on behalf of the 20,000 members of the National Association of Criminal Defense Lawyers and its state and local affiliates, on the subject of the RICO Reform Act of 1989, by Samuel J. Buffone and Terrance G. Reed of the Washington, D.C. law firm of Asbill, Junkin, Myers & Buffone, Chartered. Our practice consists primarily of white collar criminal cases with a heavy emphasis on criminal and civil RICO litigation. We have written extensively on the subject of criminal and civil RICO. Terrance Reed has also written law review articles on federal forfeiture law and is a co-author of the treatise "Civil RICO" published by Matthew Bender & Co.

THE NEED FOR CRIMINAL RICO REFORM

For the third consecutive session, Congress is taking up the issue of RICO reform. During these extended legislative deliberations, a general consensus has emerged that the RICO statute is overbroad and reaches areas of conduct far removed from those which motivated the 91st Congress to enact RICO in 1970. By limiting the re-examination of RICO to issues involving RICO's civil provisions, however, Congress has overlooked the root cause of RICO's overbreadth--the almost boundless reach of RICO's criminal provisions. By statutory definition, one cannot bring a civil RICO case without first having a criminal RICO violation. Thus, to the extent that Congress is concerned about RICO expanding into areas not within the original contemplation of its drafters, Congress must confront the inescapable fact that it is RICO's expansive criminal provisions that have caused these unintended consequences. Unfortunately, the current RICO reform bill, S. 438, fails to address RICO's criminal provisions in any significant way other than, paradoxically, to expand criminal RICO further. The NACDL urges Congress to examine the real causes of RICO's overbreadth -- the expansive statutory definitions of a RICO violation and RICO sanctions -- and amend the RICO statute to narrow RICO's reach to circumstances appropriate to the powerful sanctions that RICO authorizes.

I. Important Limitations on RICO's Essential Elements.

RICO belongs to that rare species of federal criminal laws which makes criminal only acts which are already subject to criminal prosecutions under other federal criminal statutes. Hence, RICO prosecutions are properly reserved for those who commit specified federal crimes in a way which makes their perpetration a serious enough threat to society to warrant treatment different from the typical criminal defendant. Because RICO is facially applicable to a wide variety of criminal behavior, however, it has been applied expansively to all types of civil and criminal defendants.

RICO's expansive reach is traceable to the broad statutory and judicial interpretations of RICO's three key elements: (1) what constitutes a RICO "enterprise"; (2) what criminal violations are listed as "racketeering activity" and can be predicate offenses triggering potential RICO prosecution; and (3) when the predicate offenses are sufficiently related to constitute a "pattern" of racketeering activity. By placing reasonable restrictions on the definitions of each of these elements, Congress can restrict RICO's reach to the truly serious offender whose concerted actions represent a threat of the kind which motivated the enactment of RICO in the first place.

A. The Enterprise Element.

RICO's enterprise element is, in many respects, the cornerstone of a RICO offense. In large part, RICO was enacted to provide protection for legitimate businesses from the infiltration of organized crime. Thus, the statutory definition of a RICO enterprise as including legal entities such as corporations or partnerships furthers this goal by criminalizing the actions of those who would takeover or operate such legitimate enterprises by means of racketeering activity.

The Supreme Court has interpreted RICO's enterprise element to encompass not only legitimate businesses, but also associations of individuals or entities who combine to commit proscribed racketeering acts. See United States v. Turkette, 452 U.S. 576 (1981). When the alleged RICO enterprise is not a legal entity, but rather an association of individuals or de jure entities, however, RICO strays from the task of protecting legitimate businesses and enters the realm of criminalizing concerted conduct by groups, an area traditionally addressed by conspiracy law. Because the case has yet to be made that the federal conspiracy law is inadequate to the task of policing group criminality, little or no need exists for applying RICO in this context. Almost invariably, any RICO case involving an association-in-fact type of RICO enterprise can be prosecuted as a conspiracy case. See, e.g., United States v. Neapolitan, 791 F.2d 489, 499 (7th Cir. 1986) (association in fact enterprise is not synonymous with a conspiracy but may have same members), cert. denied, 107 S. Ct. 422 (1986); United States v. Griffin, 660 F.2d 996, 1000 (4th Cir. 1981) (association in fact enterprise distinguishable from a traditional conspiracy because "common purpose" animates its associates), cert. denied, 454 U.S. 1156 (1982). In fact, almost all RICO criminal prosecutions using an association-in-fact RICO enterprise are brought as RICO conspiracies under § 1962(d).

Coupled with the lack of any demonstrated need for the use of RICO, as opposed to the conspiracy laws, in this area is the undeniable fact that courts have proven unequal to the task of devising a meaningful definition of when concerted criminal activity is sufficiently distinguishable from the underlying criminal conduct to qualify as a distinct RICO "enterprise" rather than just group criminality. The resulting tests for the existence of a RICO "enterprise" are so vague and flexible that both federal prosecutors and civil plaintiffs have experienced little difficulty in characterizing any type of group criminality as constituting a RICO "enterprise." See, e.g., Casperone v. Landmark Oil & Gas Co., 819 F.2d 112, 115 (5th Cir. 1987) (RICO enterprise consisted of corporation, its president, and its attorney); United States v. Aleman, 609 F.2d 298 301 (7th Cir. 1979) (house robbers constitute RICO enterprise when they commit three burglaries). The various judicial definitions for what constitutes an "association-in-fact enterprise", as opposed to a de jure business enterprise are remarkable not only because of their inherent ambiguity but also because courts have been forced to construct these definitions out of whole cloth with absolutely no guidance whatsoever from Congress. In short, Congress should clarify that its original intent in defining a RICO enterprise was to limit this term to de jure entities like corporations and leave the policing of group criminality to either conspiracy law or to RICO conspiracy law under RICO's separate conspiracy provisions, 18 U.S.C. § 1962(d).

B. The Predicate Offense Element.

When first enacted RICO in 1970, RICO designated approximately twenty-four federal and eight state offenses as "racketeering acts" which could trigger a RICO prosecution. In 1984, Congress expanded the list of racketeering acts to include state and federal obscenity violations, currency reporting violations, and trafficking in stolen vehicles or vehicle parts. In 1986, Congress added new money laundering and new witness tampering offenses as RICO predicates. The money laundering predicates incorporate a far larger number of state offenses than RICO's own specific and more narrowly tailored list of state predicate offenses. See 18 U.S.C. § 1961(1)(A). In 1988, Congress added yet another set of offenses to the growing list of predicate RICO offenses, including credit card fraud and the sexual exploitation of children. Just this year, the Senate has voted to include bank fraud offenses as RICO predicates. The RICO Reform Act of 1989 proposes adding yet more predicate offenses, some of which even the Justice Department opposes.

The steady addition of new predicate offenses over the last five years can have only one result: an expansion in the breadth of the RICO statute. It is thus ironic that the proposed RICO Reform Act of 1989, an Act with the avowed goal of restraining the unchecked growth of an overbroad statute, would further expand this list of predicate offenses by adding more than a dozen new predicate RICO offenses. If the problem with RICO is that it finds application in areas not typically associated with organized crime, it would be wise to consider whether the predicate offenses already enumerated as "racketeering acts" are serving their intended purpose rather than aggravate the problem by simply adding numerous new RICO predicate offenses.

C. Pattern of Racketeering Activity.

The third key element of a RICO violation, and the one which has proved the most nettlesome for the judiciary, is the pattern element. Again, the only guidance provided by Congress is that a pattern must contain at least two criminal acts. The same criminal transaction, however, can and frequently does violate different predicate offenses. Surely the 91st Congress, in limiting the pattern definition to two offenses, was not merely attempting to test the creative ability of government or plaintiff's counsel to allege more than one offense out of a single criminal event. But again, the lack of any legislative guidance left courts to speculate as to what was the Congressional intent in coining the term of a "pattern" of racketeering activity.

After federal courts struggled for years with identifying a definition for a RICO "pattern," the Supreme Court, again essentially without any legislative guidance, fashioned a definition for a RICO pattern in H.J. Inc. v. Northwestern Bell, Inc., 45 U.S.L.W. 3181 (U.S. June 26, 1989). In his concurrence in H.J. Inc., however, Justice Scalia noted that the ambiguity of RICO's "pattern" definition survives and is "intolerable," suggesting that it may be unconstitutionally vague as well. Id. at 3187-88 (Scalia, J., with Rehnquist, C.J., O'Connor and Kennedy, J.J., concurring). Rather than wait for another round of litigation over the constitutional adequacy of RICO's pattern definition, Congress should take this opportunity to provide a narrower and less vague statutory definition for RICO's pattern element. Congress should also examine the Court's definition of a RICO "pattern" to determine whether it is consonant with the intended role of RICO.

II. RICO's Sanctions.

While RICO's civil remedies have remained the same since RICO was enacted in 1970, Congress has greatly expanded the array of criminal sanctions available in RICO prosecutions. In particular, in 1984 Congress substantially broadened the scope and availability of criminal forfeiture as a RICO sanction. Contrary to common belief, RICO authorizes the forfeiture of much more than the profits of crime. In a variety of ways, RICO authorizes the federal government to obtain the forfeiture of legitimate assets legitimately earned by a RICO defendant.

Moreover, RICO forfeitures can create widespread economic dislocations because, upon indictment or the issuance of a pretrial restraining order, a defendant is transformed into a commercial leper, leading those who have previously dealt with the defendant to question whether existing contractual rights or credit relationships are enforceable.

Indeed, forfeitures under RICO have a unique coercive impact unlike that available to the government in other forfeiture cases such as drug, obscenity or money laundering prosecutions. Unlike other forfeiture laws, RICO permits the government to obtain significantly more than ill gotten gains--it may reach a defendant's entire interest in an alleged RICO enterprise wholly apart from whether the defendant obtained this interest through crime. Thus, contrary to public perception, RICO forfeiture is not surgically limited to reaching only the profits of crime.

The dramatic consequences of forfeiting a defendant's interest in the enterprise are underscore in the Drexel case. Individual defendants, like Michael Milken, face the prospect of being stripped of all of their property interests in Drexel, no matter how they were acquired, by the simple expedient device of alleging that Drexel is the RICO enterprise. Thus, the fruits of a lifetime of legitimate labor may be seized by the government under RICO based on a single or a series of fraudulent transactions. For institutional defendants like Drexel Burnham the choice may literally be one of corporate life or death.

The fact that the impact of these potential sanctions can be triggered before trial by means of pretrial orders restraining a defendant from using allegedly forfeitable assets also raises the stakes considerably for an institutional RICO defendant. Nor can any faith be placed in the due process protections allegedly available to prevent improper pretrial restraining orders in RICO cases. The Justice Department has vigorously asserted that a RICO defendant has no constitutional or statutory right to a hearing on the merits of whether the government can obtain a pretrial restraining order barring the defendant from using his presumptively legal assets prior to trial. The government has always taken the position that an indictment, in and of itself, provides all the due process a defendant is entitled to before a district court must issue a restraining order prohibiting a defendant from transferring or encumbering allegedly forfeitable assets. Thus, both defendant and affected third parties typically must await the outcome of the criminal trial to ascertain whether past and future commercial transactions are valid. This uncertainty renders the defendant a commercial leper within the business community.

In fact, at the Justice Department's urging, amendments were made to RICO's forfeiture provisions in 1984 in an attempt to codify the government's position that no process was due a defendant before a pretrial restraining order could issue. Several federal courts have, both before and after 1984, concluded that our constitution does, in fact, mandate that a defendant be provided with a due process hearing before such restraining orders be issued. Those federal courts which have recognized due process rights have done so in the teeth of the plain language of the RICO statute, and in several cases have expressly held that RICO's language in this regard is unconstitutional. Thus, whether a due process hearing is available to a RICO defendant depends on which federal circuit he is in, and this demonstrates the inadequacy of the RICO statute rather than the lack of a need for reform.

Nor is the alleged need for a meaningful "jail" substitute for corporate defendants sufficient to justify blind acceptance of the current scope of RICO's forfeiture provisions. The Sentencing Commission has proposed a balanced approach to corporate sanctions, favoring a measured judicial use of different sanctions such as restitution, fines, forfeiture, administrative sanctions, and corporate probation. More than adequate means exist to bring home our society's hostility to corporate crime without the need to elevate forfeiture sanctions as the necessary prescription for corporate crime.

Least persuasive of all is the argument that RICO forfeiture somehow "compensates victims." To the contrary, RICO's forfeiture provisions undermine victim compensation by taking assets from the defendant and giving them to the government which is under no obligation to give them to anyone, much less to victims. At the end of this process a RICO defendant is frequently financially unable to satisfy even the legitimate demands of true victims for compensation. Moreover, the process generates whole new classes of victims as innocent third parties who have had business dealings with the RICO defendant now must await the result of the criminal litigation to ascertain whether their prior transactions will be upheld or will be voided by the government under the legal fiction known as the relation back doctrine. These are the government's victims and their interests, like those of the defendant's alleged victims, are not advanced by RICO's forfeiture provisions. Even those unsympathetic with criminal defendants per se, surely must register some concern when RICO creates new victims and redresses none.

The primary reason innocent third parties are negatively affected by filing of a RICO forfeiture claim is the operation of the relation back doctrine. The relation back doctrine was originally enacted in 1984 as a means of preventing fraudulent pre-conviction transfers of property by the defendant.

Unfortunately, the relation back doctrine, which purports to void title to forfeiture assets of the time offense rather than conviction, does not distinguish between fraudulent and non-fraudulent post-offense transactions. As a result, all who have dealt with a defendant since the alleged date of the RICO offense -- a period that can span years -- are suddenly placed in the position of having the validity of their transactions cast into doubt. Under the relation back doctrine, the government, like a bankruptcy trustee, has the power to void past transactions. Moreover, the government need not prove that these transactions were fraudulent in order to invalidate them and secure financial gain to the government. Thus, the relation back doctrine, created to challenge fraudulent transfers, is not limited to fraudulent transfers; rather, it allows the government to overturn any transaction.

The breadth of this power, and the resulting in terrorem effect it can have on third parties, explains why third parties are left dangling in the wind to find out whether their property rights are voided as a result of the RICO prosecution. The overbreadth of the relation back doctrine is also apparent when consideration is given to the other means that Congress has enacted to combat fraudulent pre-conviction transfers. In 1984, for example, Congress enacted a special fine provision allowing the sentencing judge in a RICO case to impose an additional fine of twice the defendant's gross illicit profile. 18 U.S.C. § 1963(a). In addition, in 1986, Congress enacted a substitute fine provision, 18 U.S.C. § 1963(m), which authorizes the forfeiture of a RICO defendant's legitimate assets to replace any forfeited assets that he may have dissipated to avoid forfeiture. Finally, the broad powers available to the government to seek pretrial restraining orders to present property transfer before or after indictment and on an _ex parte_ basis, significantly reduce the chances of a defendant successfully avoiding forfeiture by transferring forfeitable assets. Given the presence of these other provisions, and the dramatic negative consequences of the overbreadth of the relation back doctrine, Congress should amend this provision to limit its application to those transactions which motivated its enactment -- fraudulent transfers aimed at frustrating forfeiture.

The need to restrict application of the relation back doctrine has been made more urgent by the Justice Department's recently adopted position that a primary purpose of criminal forfeiture is to raise revenue for the federal government -- a rationale never expressly embraced by Congress. Criminal forfeiture, as initially adopted in 1970 with RICO's passage, was enacted as _punishment_. In 1984, Congress created an asset forfeiture fund to ensure that seized assets were being properly accounted for and managed.

The asset forfeiture fund was viewed as a means toward the end of promoting the efficient use of forfeiture as a punitive sanction. In 1989, however, the Justice Department took the novel position that forfeiture is a revenue-raising measure aimed at filing the coffers of the asset forfeiture fund in order to promote the Justice Department's fight against crime. This position was subsequently ratified by the Supreme Court in Caplin & Drysdale v. United States, slip op. at 11 (June 22, 1989) as follows:

> [T]he Government has a pecuniary interest in forfeiture that goes beyond merely separating a criminal from his ill-gotten gains; that legitimate interest extends to recovering all forfeitable assets, for such assets are deposited in a Fund that supports law-enforcement in a variety of important and useful ways.

Thus, rather than being a means to an end, the Asset Forfeiture Fund has become an end in itself. With revenue enhancement a declared goal of criminal forfeiture under RICO, it is imperative that Congress expressly limit the broad scope of the relation back doctrine to its original intended mission -- to attack fraudulent transfers, not every financial transaction in which a defendant has engaged.

In sum, RICO's forfeiture provisions should not, as some have urged, be treated as sacrosanct. Especially when Congress has tacitly acknowledged that other provisions of the RICO statute are too broad and deserve re-examination and reform, the

RICO's forfeiture provisions should not remain immune from careful examination. When the government has repeatedly contended that RICO's forfeiture laws should be enforced by depriving a defendant of the ability to pay essential living expenses for himself or his dependents prior to trial, the time is ripe for a more balanced perspective on the goals of forfeiture as a criminal sanction under RICO.

STATEMENT OF

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AMERICAN CIVIL LIBERTIES UNION
WASHINGTON OFFICE

ON BEHALF OF

THE AMERICAN CIVIL LIBERTIES UNION

ON

S. 438

THE RICO REFORM ACT OF 1989

BEFORE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

JUNE 16, 1989

Mr. Chairman and Members of the Subcommittee:

Thank you for allowing me to submit testimony on behalf of the more than 250,000 members of the American Civil Liberties Union (ACLU). The ACLU strongly supports reform of the Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. §§ 1961-1968 (RICO). We applaud the efforts to reform civil RICO and commend the Subcommittee for holding these hearings. We encourage prompt passage of the RICO reform legislation, S. 438.

I. LEGISLATIVE HISTORY

The declared purpose of Congress in enacting the RICO statute was "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." 116 Cong. Rec. 35,191 (1970) (Statement of Rep. Sisk). Senator McClellan stated that the purpose of RICO was to provide "a major new tool in extirpating the baneful influence of organized crime on our economic life." 116 Cong. Rec. 25190 (1970). Indeed, organized crime's activities were growing in scope and number, thus stimulating strong bi-partisan support for additional statutory methods to combat its continued expansion.

Appearing before the Senate in January of 1970, Lawrence Speiser, then director of the Washington office of the ACLU, stated, "we strongly endorse governmental efforts to stop the activities of organized crime which so adversely affect our society," but continued, "that these efforts must not evade constitutional safeguards available to all under our system of government." Moreover, the ACLU warned that RICO might be utilized, "in times of stress, or where the aim seemed laudable .. in areas far removed from what we know as organized crime." (testimony before the Senate Judiciary Committee, January, 1970, 490). Mr. Speiser speculated that RICO could be used to punish freedom of speech or to interfere with the right to counsel by forcing lawyers to forfeit their fees paid by clients who were charged under RICO. These charges were dismissed as speculative at the time, but both of Mr. Speiser's conjectures have become reality.

Apprehension regarding the new statute's breadth was not restricted to the ACLU. Congressman Mikva warned that "the spread of the shotgun approach will involve a lot of activities not intended to be covered and will not be successful in addressing itself to the problems that were intended to be covered ... The overreach, the looseness of the language, the whimsy of this bill just simply does not enhance the legislative process." 116 Cong. Rec. 35205 (1970).1/

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1. As will be shown throughout this testimony, these concerns have been manifested. In the landmark case of Sedima S.P.R.L. v. Imrex, 473 U.S. 479 (1985), the Supreme Court stated that RICO is being used for purposes far different from those envisioned in 1970. Civil RICO has become a favorite tool of the private bar. With enticements including federal court access, treble damages, attorney's fees, costs, and the label "racketeer" affixed to the defendants, the number of civil suits initiated under RICO quadrupled from 1982-1986. (New York Times, Sept. 24, 1986, at A17.)

A. Civil RICO

1. Legislative History

The legislative history on civil RICO is sparse, and suggests that the civil provisions of RICO were hastily conceived. The civil measures of RICO were a legislative afterthought, not included in the Senate version of the bill. The civil provisions were tacked on later in the House bill and agreed to by the Senate without conference. See, Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 507 (1985). While its purpose was to allow victims of organized crime to readily seek financial redress, and to punish financially organized crime, its current application is more likely to involve "garden variety" fraud cases against reputable businesses, and against political organizations rather than against the "mob" enterprises envisioned by Congress in 1970.

2. Statutory Provisions

The RICO statute makes four types of conduct unlawful and, hence, subject to civil RICO. Generally, it is unlawful to: (1) use or invest income derived from a pattern of racketeering to acquire an interest in an enterprise; (2) acquire or maintain an interest in any enterprise through a pattern of racketeering activity; (3) conduct or participate in the affairs of an enterprise through a pattern of racketeering activity; or (4) conspire to violate any of the foregoing provisions. 18 U.S.C. Sec. 1962.

Most civil RICO cases seem to involve (3) and (4) above. The plaintiff must show the existence of an "enterprise," which is defined so broadly as to include almost anything,[2] and establish a "pattern" of racketeering activity constituted by commission of, or conspiracy to commit, at least two predicate crimes within a ten-year period. See 18 U.S.C. Sec. 1961(5); see also U.S. v. Turkette, 452 U.S. 576, 583 (1981). Predicate acts include not only such traditional organized crime activities as murder and arson, but also an ever-growing number of other crimes, including violations of some state laws.

As to remedies, "any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. Sec. 1964(c).

To prevail in a civil RICO action, a plaintiff must prove his claim by a preponderance of the evidence, a level of proof that is certainly less demanding than "clear and convincing" or the normal level in criminal law, "beyond a reasonable doubt." The defendant is denied criminal law's procedural protections and its heightened burden of proof. Civil RICO does not require a conviction of the underlying predicate activities.

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[2] 18 U. S. C. §1961 (4): "'Enterprise' includes any individual, partnership, corporation, association, or any other legal entity, and any union or group of individuals associated in fact, although not a legal entity."

Because of treble damages, other significant sanctions and the ease with which it is applied to fact situations far removed from organized crime, civil RICO has become the weapon of choice for the private litigator. It is suggested that the mere threat of treble damages and being labeled a "racketeer," intimidates defendants into settlement in non-meritorious suits. This intimidation may occur not only in ordinary commercial litigation, but also in disputes involving ideological beliefs. Use of RICO against advocacy organizations chills the individuals who might join the organization but are afraid of being sued under RICO. It also hurts the political advocacy organizations and it chills First Amendment rights of individuals who are already members.

3. Sedima

Because RICO is "a sweeping act which intrudes on state power and has great potential for abuse against individual defendants,"[3] the courts tried to impose judge-made restrictions on civil RICO, hoping that, by circumscribing its application, they might limit its abuses.

However, the United States Supreme Court, in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), took away many of the judicially imposed restrictions on the statute's scope.

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[3] See, e. g., Atkinson, "'Racketeer Influenced and Corrupt Organizations,' 18 U.S.C. §§ 1961-68: Broadest of Federal Criminal Statutes." 69 J. Crim. L. and Criminology (1978) p. 18.

First, the Court rejected lower court decisions requiring conviction of a predicate offense, ruling that a racketeering activity need only be subject to criminal sanctions, Id. at 488. Second, the Court ruled that a plaintiff need not suffer an injury separate and distinct from the injury caused by the underlying activity, stating specifically that,

> "if the defendant engages in a pattern of racketeering activity in a matter forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under sec 1964(c). There is no room in the statutory language for an additional, amorphous 'racketeering injury' requirement." Id. at 495.

As a 5-4 decision, Sedima is not an enthusiastic endorsement of the tremendous breadth of the RICO statute. On the contrary, though failing to judicially refocus RICO, the Court opined, "This defect--if defect it is--is inherent in the statute as written, and its correction must lie with the Congress." Id. at 499. Voicing its recognition that, in its private civil version, RICO has evolved into something manifestly askew from the original conception of its creators, the Court nevertheless deferred to the wisdom of Congress to correct the statutory inadequacies. Id. at 499-500.

II. CIVIL LIBERTIES CONCERNS

The ACLU is committed to the vigilant defense and protection of the Bill of Rights. Perhaps the most sacred of these rights, and of paramount importance in the minds of the drafters of the Constitution, are those embodied in the First Amendment--the rights of free speech and of association. Indeed, the Supreme

Court stated "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process ... by collective effort individuals can make their views known, when, individually their voices would be faint or lost." Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 294; 102 S.Ct. 434, 436; 70 L.Ed. 492, 497-498 (1981).

RICO chills the rights protected by the First Amendment. Civil RICO, can allow the criminal acts of one person to cause innocent organizations and individuals with which the criminal is associated in lawful activity to be brought into a RICO suit. Facile pleading requirements readily subject an organization or individuals, with little relation to the predicate acts or enterprise, to the threat of federal treble damages. The ACLU abhors the "guilt by association" capabilities engendered in RICO. With "enterprise" and "pattern of racketeering activity" so loosely defined, liberal pleading requirements easily satisfied, implication by association, the specter of treble damages, costly defense, intrusive discovery, and the "racketeer" label, civil RICO can be a threat to First Amendment rights.

We strongly caution against thinking that a judgment is necessary for adversely affecting the civil RICO defendant. On the contrary, bringing the suit often accomplishes the objective-to threaten an ideological opponent.

The mere onset of litigation can provide a serious affront to First Amendment privileges. Indeed, plaintiffs intolerant of a group's opinions, may file suit, realizing their allegations will be very difficult to prove, with the sole intention of inhibiting the activities they consider to be an imposition. Our system cannot tolerate such casual use of the courts to achieve political ends through litigation, especially when these ends are not grounded in legitimate allegations.

Plaintiffs bringing suit under civil RICO may do so feeling that it's entirely possible to attribute the criminal activities or racketeering of a particularly overzealous activist to others associated with the same cause, thus permitting suit against a wide range of defendants associated, however remotely, with the same activist enterprise. While the group or individuals responsible for the criminal activities should be sanctioned[4/] this must not be allowed to impugn the associational rights of related parties. Unfortunately, liberal pleading can allow just such a result. Rule 11 F.R.C.P. does not protect against the use of RICO in these circumstances.[5/]

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[4] 4. As is discussed infra, at p. 13, the ACLU is also concerned that RICO criminal sanctions, because they are extraordinary, constitute overkill when applied to political advocacy organizations.

[5] 5. Rule 11 of the Federal Rules of Civil Procedure, which requires that attorneys sign only those pleadings that they believe in good faith to be true, is supposed to guard against frivolous lawsuits. Rule 11 is inadequate protection for civil liberties which are threatened by RICO. Rule 11 is useful in imposing sanctions on lawyers who have flagrant misrepresentations in their complaints, See, e.g. Rubin v. Buckman, 727 F. 2d 71 (3d Cir. 1984) plaintiff falsely alleged Hong Kong citizenship to establish diversity of citizenship with a New Jersey defendant and revealed the misrepresentation only

The instant a complaint is filed the adverse party is, under the statute, labeled a "racketeer." Clearly this is not a preferable scenario for an organization which may already be espousing views not shared by the entire community. The prohibitive cost of litigation alone may be enough to cause a group to cease what should be protected First Amendment behavior. Furthermore, liberal pleading requirements allow a plaintiff to include a loosely associated array of defendants in its claim. Under RICO's expansive provisions and vague language, plaintiffs can survive a motion to dismiss, even on strained allegations.[6]

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after the defendant won the summary judgment motion. Rule 11 has also been used to sanction attorneys who have "not done their homework" in preparing a complaint, See, e. g. Albright v. Upjohn Co. 788 F.2d 1217 (6th Cir.1986) plaintiff sued Upjohn because drug products she was using caused stains to her teeth. Unfortunately, for plaintiff, Upjohn did not manufacture the products she had used. But Rule 11 does not provide enough protection to people who could, because of their associational ties, be named in a RICO complaint, even though they have not committed any RICO predicate acts. The pleading with particularity provision in the proposed legislation would help ameliorate this injustice. Lawyers would have to stop and think before naming someone as a RICO defendant and would have to be able to allege specific facts about each defendant's involvement in the predicate offenses.

6. When a defendant moves to dismiss under Rule 12(b)(6), he faces formidable obstacles. A complaint will not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." Conley v. Gibson, 355 U.S. 41; 78 S.Ct. 99; 2 L.Ed. 2d 80 (1957). In deciding whether to grant a motion to dismiss, "factual allegations of the complaint are to be accepted as true", and "reasonable factual inferences will be drawn to aid the pleader." D. P. Enterprises v. Bucks County Community College, 725 F. 2d 943 (3d Cir. 1984). Under these standards, it is difficult for a defendant to prevail at this stage. If a defendant is a member of a political advocacy organization, some of whose members are alleged to have engaged in RICO predicate

This obstacle conquered, intrusive discovery proceedings, which may prove particularly damaging to political advocacy groups, soon follow.[7]

The ACLU believes that civil RICO's potential for use against political advocates is enormous. The most notable manifestation of this has been in the abortion clinic context. In at least a dozen cases, clinics have used civil RICO to sue abortion clinic protestors (See for example, Feminists Women's Health Center v. Dottie Roberts (W.D. Wash.), Northeast Women's Center, Inc. v. McMonagle (E.D. Pa.), Portland Feminists Women's Health Center v. Advocates for Life (Ore. Cir. Ct.).)

The most completely litigated case is Northeast Women's Center, Inc. v. McMonagle, 624 F. Supp. 736 (E.D. Pa. 1985) vac & rem; 813 F.2d 53 (3d Cir, 1987) on remand; 665 F. Supp. 1147 (E.D. Pa. 1987); 670 F. Supp. 1300 (E.D. Pa. 1987); 689 F. Supp. 465 (E.D. Pa. 1988); 868 F.2d 1342 (3d Cir. March 2, 1989), reh. den. March 30, 1989 (NEWC), which upheld the use of RICO against abortion clinic protestors. In August 1985, plaintiffs accused

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acts, mere membership in the association might be enough to enable plaintiff to survive a motion to dismiss under Rule 12 (b) (6).

[7] For example, in Northeast Women's Center, Inc. v. McMonagle, 689 F. Supp. 465, 470 (E. D. Pa. 1988), the Court allowed the plaintiffs, to discover the fundraising, expenditure and corporate record of the Pro-Life Coalition of Southeast Pennsylvania, which was not a party to the action. The court also allowed discovery as to fundraising, expenditure and corporate record of any other anti-abortion organizations to which defendant McMonagle belonged. Plaintiffs successfully introduced evidence at trial consisting of minutes of Board of Directors meetings.

defendants of violating RICO by engaging in actions, and conspiring to engage in actions, that harmed the clinic's business. Among these actions were forcible entries into the clinic. Plaintiffs named 42 defendants and charged them with violation of the Racketeer Influenced and Corrupt Organizations Act. All 42 plaintiffs moved to dismiss the RICO claim under Rule 12 (b)(6). In October 1985, the Court denied the motions stating "it cannot be said that no set of facts proven in relation to the plaintiff's complaint could result in liability for defendants under RICO, thus, the plaintiff's RICO count will not be dismissed." NEWC, 624 F. Supp. 736, 738. All 42 plaintiffs had to go through the discovery process. Of these 42 defendants, 11 were dismissed by plaintiffs shortly before and shortly after the start of the trial.

Thirty-one (31) defendants went through the entire trial process. At the end of the trial in May, 1987, four (4) of the 31 defendants were granted a directed verdict since the only reasonable conclusion was that these 4 defendants had not violated RICO, NEWC 670 F. Supp. 1300, 1310. The remaining 27 defendants were found by the jury to have violated RICO. In March, 1988 the court granted one defendant judgment notwithstanding the verdict, since the evidence did not support the jury verdict finding this sole defendant liable, NEWC 689 F. Supp. 465, 476. Of the total of 42 defendants named in the complaint, 16 were found to have been innocent of racketeering charges. Stricter pleading requirements would have prevented the naming of many of these 16 as defendants.

In NEWC, the district court found, and the Third Circuit affirmed, that 26 defendants were guilty of a pattern of racketeering activity, because they engaged in extortion and robbery. The facts show that on four different occasions protestors trespassed on clinic property. The district court found that this constituted extortion against the clinic, employees of the clinic, and clinic patients. After one of the trespasses, the court found that "certain medical tubes, bottles, and knobs were missing." NEWC 670 F. Supp. 1300, 1308. This was enough to establish a prima facie case of robbery. The jury found that $887 worth of equipment had been destroyed or stolen as a result of this robbery, and awarded that amount in damages to the clinic on the RICO violation.[8]

Is this the kind of activity that the Congress had in mind when it passed RICO in 1970? More importantly, is this the intent of Congress now? The ACLU believes that the kind of behavior engaged in by the 26 defendants found liable in NEWC should not be punishable by the extraordinary sanctions found in RICO. It is overkill to have a federal treble damages statute which applies to political advocates who engage in this kind of activity. After NEWC, RICO applies to anti-nuclear protestors, anti-apartheid protestors, and animal rights protestors who occasionally have done the same things that abortion clinic protestors did in NEWC.[9] They trespass and damage property. The ACLU believes that state remedies are adequate to protect against this kind of illegality.[10] Use of RICO--because of trebled damages and the "racketeer" label--unnecessarily chills expressive and associational conduct.

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[8] Two defendants, Patricia Walton and Linda Corbett, had never been inside the clinic. Ms. Walton had "blockaded" the front door of the clinic, and Ms. Corbett had "barricaded" the only open entrance to the parking lot. Ms. Corbett had also blocked the path of a doctor's car while the doctor was trying to get to work. The court held that this evidence was sufficient to allow the extortion claims against these two women to go to the jury. Northeast Women's Center, Inc. v. McMonagle 670 F. Supp 1300, 1309 fns. 13, 14.

The jury found both women liable for extortionate activity. The court then granted Ms. Corbett a judgment notwithstanding the verdict because no evidence was presented as to the existence of any agreement whereby Ms. Corbett would conduct or participate in the activities of the enterprise through the commission of predicate offenses as defined under RICO. Northeast Women's Center, Inc. v. McMonagle 689 F. Supp. 465, 475.

III. RICO REFORM

The ACLU believes that the bill before the Committee corrects some of the deficiencies in existing RICO law.

Among the changes we applaud are the stricter pleading requirements, narrowing of the availability of treble damages by requiring, in certain instances, conviction of underlying predicate activity, changing the level of proof from preponderance to clear and convincing with regard to punitive damages, and elimination of the pejorative term "racketeer."

S. 438 will curb some of the First Amendment abuses engendered in current RICO law, while preserving its ability to carry out its intended purpose, namely the eradication of organized crime's infiltration of legitimate business. The bill would discourage the filing of groundless suits by circumscribing the situations under which a legitimate action may be brought.

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[9] Professor Bob Blakey, RICO's drafter and staunch defender, has been reported as saying that RICO would have applied to the civil rights activities of Dr. Martin Luther King, Pittsburgh Press "Protesters fear more racketeering lawsuits", May 7,1989.

[10] For example, in NEWC the jury award for trespass was $42,974.95.

Of crucial concern to the ACLU is an amendment to RICO's liberal pleading requirements. The legislation would require a plaintiff, seeking redress under RICO, to aver with particularity the facts which support the plaintiffs claim against each defendant named in the action. S. 438 would require that all RICO predicate acts be plead with particularity. The extraordinary remedies available under RICO, protection of the defendant's reputations, and preventing politically motivated suits justify this greater pleading requirement.

In suits brought by private litigants, S. 438 would require a conviction of an underlying unlawful activity, in order to obtain treble damages. Under the bill, a plaintiff suing several defendants could only obtain automatic treble damages against the particular defendant convicted of a predicate offense. Without such a measure, defendants are subject to severe remedies for criminal acts without the procedural protections afforded by criminal law, nor its heightened burden of proof. This provision provides needed protection against the drastic remedy of treble damages.

Additionally, a litigant seeking punitive damages against an unconvicted defendant must first meet certain statutory conditions. Two of these conditions are that the remedy must be consistent with federal securities laws, and the plaintiff must show by clear and convincing evidence that the defendant actions were consciously malicious, or so egregious and deliberate that malice may be implied.

To alleviate the stigmatization suffered by the party against whom a RICO action is brought, S. 438 changes the term "racketeer" and variants thereof to "unlawful activity", in complaints which do not allege a crime of violence.

IV. REFORMS NOT MADE BY S. 438

Although S. 438 is a good beginning in reforming RICO, it is standing alone, not enough. On the civil side, the bill's provision for pleading with particularity helps protect First Amendment freedoms by making it more difficult to add innocent parties to a RICO lawsuit. For more complete protection, it is necessary to exempt all politically motivated activity from RICO. This could be accomplished by adoption of a primary economic purpose test for a RICO enterprise. The deterrence of treble damages, costs, and attorney's fees is not appropriate for organizations whose primary purpose is political not economic.[11]

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[11] Courts have recognized this concept in holding that non-economic crimes should not be cognizable under RICO.

In United States v. Ivic, 700 F.2d 51 (2d Cir. 1983), the second circuit relied on the legislative history of § 1962(d) in holding that "when an indictment does not charge that an enterprise or the predicate acts have any financial purpose, it does not state a crime under § 1962(c)." Id. at 65. Not only is the term "enterprise" used in subsections (a) and (b) to refer to the "sort or entity in which funds can be invested and a property interest of some sort acquired, and hence the sort of entity which one joins to make money," but Senator McClellan himself, We urge the Committee to add such a provision to the pending legislation.

Basically, RICO is a criminal statute. In limiting itself to civil RICO reform, S. 438 does not address some of the fundamental problems with the statute.[12] Our main concerns are:

"the principal sponsor of the Organized Crime Control Act of 1970, [has] made clear on several occasions that the purpose of Title IX is 'economic' and that the only crimes included in s 1961(1) are those adapted to 'commercial exploitation." Id. at 63. See e.g., 116 Cong.Rec. 18940 (1970); The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?, 46 Notre Dame Law. 55, 161-62 (1970). The defendants in Ivic were charged with participating in an enterprise which used "terror, assassination, bombings, and violence in order to foster and promote their beliefs and in order to eradicate and injure persons whom they perceived as in opposition to their beliefs," but because there were no charges of any economically motivated activities, the judgment against the enterprise under RICO was dismissed.

We see the second circuit following the same logic in United States v. Bagaric 706 F.2d 42 (2d Cir 1983), cert den 104 S. Ct. 133, 104 S. Ct. 134, 104 S. Ct. 283 (1983); cert den 464 U.S. 840, 464 U.S. 917 (1983). Although Bagaric was factually very similar to Ivic in that it involved a terrorist enterprise charged with murder, bombings, etc., there was one very important difference between the two cases; in Bagaric, unlike in Ivic, the "core of the enterprise was the commission of more than fifty acts of the classic economic crime of extortion which were carried out either to compel payment or in retaliation for refusal to meet appellants' extortionate demands." Id. at 58. The defendants sent letters to wealthy Croatians demanding the payment of between $5,000 and $20,000 and warned that if payment was not made reprisals would soon follow. The money was to be used in preparing for the violent overthrow of the Belgrade government. Id. at 48-49. It was only because this particular terrorist enterprise had an underlying economic core that the Bagaric court found the defendants liable under civil RICO. See also Republic of Philippines v. Marcos, 818 F.2d 1473 (9th Cir. 1987), reh'g granted, 832 F.2d 110 (1987), (conduct under RICO must have harmful effect on the economy of the United States).

[12] Many of our concerns were expressed by Prof. Gerard E. Lynch of Columbia University Law School in his testimony before the Crime Subcommittee of the House Judiciary Committee on May 4, 1989.

1) pre-conviction seizure of assets; 2) pre-conviction seizure and the right to choose counsel; and 3) the vagueness and overbreadth of RICO generally.

Seizing the assets of an enterprise merely upon an accusation of a RICO violation is now widespread practice. An indictment is merely an accusation and is supposed to carry no burden of guilt. The accused is presumed innocent, and the government bears the burden of proving guilt beyond a reasonable doubt. RICO turns that basic principle of American justice on its head. A person is indicted and then, before trial the defendant's assets are seized or frozen. In the case of Princeton/Newport, which required capital to operate, unindicted partners pulled out and the firm collapsed without a trial and while a superseding indictment was being sought.[13]

Second, pre-conviction seizure is especially problematic because it can affect the right to hire an attorney. Title to property obtained as a result of a crime vests in the government at the time of the violation, 18 U. S. C. § 1963 (c). Before the commencement of a trial, a prosecutor could obtain a restraining order that would deny a defendant access to funds with which to defend himself.[14]

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13. This discussion of pre-trial forfeiture is taken from Ira Glasser, "RICO Chickens Come Home to Roost" Wall Street Journal February 17, 1989, p.A15. Ira Glasser is Executive Director of the ACLU.

14. The Supreme Court is reviewing this issue in United States v.Monsanto, 852 F.2d 1400 (2d Cir. 1988) and In re Caplin & Drysdale, 837 F.2d 637 (4th Cir. 1988).

Our third concern with criminal RICO is the breadth and vagueness of the statute. Anyone who participates in the affairs of an enterprise [15] by means of a "pattern of racketeering"[16] is guilty of a RICO violation. In short, the problems with civil RICO are the problems with criminal RICO as well. Violation of RICO carries with it greatly enhanced criminal penalties. As Prof. Lynch said in his testimony before the Crime Subcommittee of the House Judiciary Committee on May 4, 1989:

> "The one pervasive problem in RICO is that the vagueness of its terms make extremely serious penalties available virtually whenever prosecutors choose to invoke them, without the identification of genuine aggravating circumstances justifying the more serious penalties."[17]

Because of the pervasive problems[18] with civil and criminal RICO which arise from the vagueness of the statutory terms, we

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15. 18 U. S. C. §1961 (4): "'Enterprise' includes any individual, partnership, corporation, association, or any other legal entity, and any union or group of individuals associated in fact, although not a legal entity."

16. Basically the commission of two crimes over ten years.

17. Summary of Statement of Gerard E. Lynch

18. Indeed, the problems are made more pervasive by the addition of new predicate offenses. For example, the addition of obscenity predicates in 1984 has caused serious problems. If a bookseller has two obscene books for sale, he stands in danger of losing his entire interest in the RICO enterprise, including all legitimate assets owned in legitimate entities. RICO thus puts the burden on booksellers not only to be familiar with the contents of all books they have for sale, but increases the chances that booksellers, faced with RICO forfeiture penalties, would refuse to carry any book that might be objectionable. Obscenity should not be a RICO predicate act.

The ACLU opposes the addition of new predicate acts in S. 438. RICO was expanded in 1984, 1986 and 1988. There is no need for further expansion.

recommend that Congress replace RICO with a much more narrowly framed statute. The ACLU looks forward to working with the Committee to achieve meaningful change in this area of the law.

V. CONCLUSION

In sum, the ACLU appears here today to assert its support for the prompt reform of civil RICO as embodied by S. 438. RICO was passed to ameliorate the pervasive affects of organized crime upon society. Civil RICO has strayed from that goal and become a dangerous tool, sometimes employed in derogation of our sacred First Amendment rights. The bill helps restore these rights, lessens the potential that RICO will be used to chill protected rights, still leaving adequate sanctions against organized crime. S. 438 is a good beginning, but even if this bill passes, much remains to be done in RICO reform.

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PREPARED TESTIMONY OF ROBERT N. KAPLAN, ESQUIRE

KAPLAN, KILSHEIMER & FOLEY
NEW YORK, NEW YORK
ON S.438

BEFORE THE
SENATE COMMITTEE ON THE JUDICIARY
JUNE 21, 1989

Mr. Chairman and Members of the Committee. I am Robert N. Kaplan and I practice law in New York with the law firm of Kaplan, Kilsheimer & Foley. For the past 18 years, I have been in the private practice of law and have devoted my career to complex commercial litigation. While I have represented both plaintiffs and defendants in a variety of civil cases for several years, a substantial part of my firm's practice has been class action and derivative litigation on behalf of plaintiffs. I have been active in bar association affairs and at the present time serve as President of the National Association of Securities and Commercial Law Attorneys ("NASCAT"). [1]

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[1] NASCAT is an association of law firms specializing in complex commercial cases. NASCAT is now working on a variety of projects, including civil RICO. NASCAT has thirty member firms across the country. In the past decade, our members have recovered hundreds of millions of dollars for victims of securities frauds and other white collar abuses. Although it is fair to say we have a plaintiffs' orientation, some of our members represent defendants as well. Some, but not all, of our members have pending RICO actions.

I.

The Premises for Legislation Have Changed Dramatically.

A number of groups have been urging Congress to enact legislation to limit private civil RICO for a period of years. When the groups first approached Congress, the Supreme Court had recently held in Sedima that private civil RICO was not confined to traditional mobsters. As I understand the case for eviscerating private civil RICO in the commercial context, it is based on the main premise that the existence of automatic treble damages is an almost irresistible lure to plaintiffs to turn ordinary commercial cases into federal treble damage litigation. In addition, the argument continues, RICO plaintiffs have an unfair advantage and defendants are "bludgeoned" into settlements they would not otherwise make. I wish to respond to these claims.

On a personal level, most plaintiffs lawyers I know do not routinely utilize RICO counts even in large-scale commercial fraud cases. Of the approximately 40 cases I am supervising, I have RICO counts in fewer than 5. Why? RICO cases are hard to prosecute for a host of reasons. They require proof of two predicate acts. Proof of the requisite elements is very difficult. In many cases, addition of a weak RICO count would detract from other good claims. Therefore, most plaintiffs' lawyers I know use RICO sparingly, reserving it for cases of gross fraud and abuse.

I am aware of no empirical proof supporting the claims of an explosion in RICO filings, although I believe that, given the revelations of wrongdoing in the past several years, an increase in RICO cases would be amply justified. The number of private RICO filings has not proliferated, but has remained steady at about 1,000 per year. According to my research, the vast majority - close to 75% - of the cases that the proponent groups claim to be abusive have been dismissed in summary proceedings; in many of these cases, the court has awarded sanctions to the defendants. In addition, the courts have given restrictive interpretations to a number of key provisions of the statute. Similarly, I am aware of no documented case of an unfair settlement or abusive judgment. Clearly, there is no articulated, documented litany of abusive cases. In my view, you are being petitioned to solve a non-problem.

More important, however, since the inception of the movement against civil RICO, there have been revelations of massive white-collar wrongdoing of previously unimaginable proportions in a host of sectors of the economy that we all previously assumed were, in general, honest and fair. You are well aware of the scandals I am referring to because they dominate front pages across the country and the airwaves almost nightly. Four years ago, who had heard of Ivan Boesky? Boyd Jefferies? Mike Milken? Who suspected that Drexel - the largest investment bank in the country - would plead guilty to six felonies? Who understood that the S&L scamsters would send the taxpayer a budget-busting bill to pay for their frauds? Who knew of the widespread abuses among defense contractors? Who could have guessed that the commodities exchanges and futures markets in both Chicago and New York would be the target of one of the largest FBI probes in history?

It seems as if in the past four years, the social barriers to white-collar crime have eroded and every aspect of American financial life is awash with fraud. Sadly, we now live in a moral environment in which Americans' pocketbooks are victimized daily by fraudulent schemes. Many of these tragedies involve direct, intentional predation by large, powerful, "respectable" interests upon Americans who are not readily able to protect themselves. While the Justice Department has estimated the annual cost of white-collar crime at $200 billion, the long-term social and economic consequences of the epidemic of white-collar crime go much further and threaten the fabric of our society itself.

The revelation of a white-collar crime epidemic, coupled with the complete dearth of empirical proof of RICO abuses, changes, in my view, the considerations upon which you base your legislative decisions and provides a principled basis for reexamination of the original premises of the various efforts to eviscerate civil RICO. I am confident that the genesis of the various Congressional proposals to curtail civil RICO was a fear of litigation abuse. I am equally confident that no member of Congress wishes to provide a billion-dollar-bailout to the Boeskys and Drexels of this world, to dishonest savings and loan managements and to dishonest defense contractors at the expense of crime victims. Yet, that is precisely the effect that some reform proposals would have.

As Senators and Members of the Committee on the Judiciary, your actions can make a significant difference in abating the corporate crime wave and in restoring traditional values and order to the marketplace. Across the country, the vast majority of average Americans continue to live by the rules you make and take their cues from the signals you send. No ordinary citizen would ever dream that Congress would retroactively eliminate damages for fraudulent criminal acts for investment bankers and the S & L, defense contracting, commodities and futures industries. Now is the time for strengthening anti-crime legislation, not for weakening victims' rights.

II.

Private RICO Is and Will Be An Important Weapon For Victims.

Many participants in the public debates argue that the solutions to the epidemic of white-collar crime lie in enhanced enforcement mechanisms for federal and state law enforcement bodies. Even apart from the prohibitive costs of increased public enforcement, that cannot be the sole solution.

The most potent weapon available to the government is criminal prosecutions. While putting wrongdoers in jail is important, public authorities on both the federal and state level are simply swamped. Resource decisions are a way of life in these agencies, which cannot possibly detect, investigate and prosecute all crimes. Invariably, prosecutors must pick and choose whom to pursue, whom to grant immunity, and from whom to accept pleas to relatively minor offenses. If the government can convict the principal perpetrators, then in general the case is considered a success.

In securities cases, for example, the government may pursue a few of the individuals who perpetrated a phony stock scheme, but rarely does it have the resources to pursue all of the perpetrators. Frequently, it is the case that the victims cannot seek effective redress from the criminally convicted defendants, but must look to the other participants to satisfy their claims.

The genius of the private action is that it permits victims to seek redress themselves without government involvement and without a penny of government expenditure on prosecutorial resources. Multiple damages is a strong deterrent to financial crime. If the only financial penalty for getting caught is to return the stolen property, the cold calculations of would-be white-collar criminals determine that crime pays. An important study of antitrust deterrence concluded that treble damages, not government enforcement actions, are the principal deterrent to price-fixing.[2] It is my experience that many of the participants in white-collar crime are far more afraid of private actions than spending a few months at "Club Fed."

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[2] The study concluded that Department of Justice price-fixing actions had a deterrent effect, but that government penalties were "trivial." The study found "support for the proposition that the effective deterrent to price fixing was the credible threat of large damage awards to private class actions that followed DOJ's actions against the same conspiracy. Consequently, only after class actions became a credible private remedy did the Antitrust Division's enforcement capacity or its filing of a bread price-fixing case deter collusion in the conspiracy-prone bread

Multiple damages are also an important incentive for victims and their attorneys to undertake the hazards, delays and frustrations of complex, contingent, class action litigation. There are a number of specific observations from my experience I wish to share with you. In general, the commercial class action cases I handle are extraordinarily complex in a number of respects. The questioned conduct usually involves a series of financial transactions over a period of time involving hundreds of thousands of pages of documentary material and a host of institutional and individual participants against a byzantine backdrop of events and legal requirements. It is almost always necessary to invoke the aid of the court even to gather from defendants and third parties the documents that are necessary to proceed. Once gathered, the documents must be organized, read, and their significance understood. It is almost always necessary for our lawyers to spend hundreds of hours analyzing the documents and for us to retain experts in accounting and particular industry standards to help us. Thereafter, it is generally necessary to take dozens of depositions, some of which can last for days. Frequently, memories of specific actions are hazy by the time that the plaintiffs' lawyers can conduct their discovery. As a result, proof of

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industry." Block, Nold and Sidak, The Deterrent Effect of Antitrust Enforcement, 89 Journal of Political Economy 429 (1981).

wrongdoing, even by the worst offenders, often requires years of hard digging because sophisticated white-collar criminals generally know well how to cover their tracks.

The opportunities and incentives for defendants to protract the litigation are manifold. It is almost invariably the case that they have far greater resources -- more money, more lawyers, more experts -- than we do. Defendants can delay the day of reckoning by resisting legitimate discovery, by filing countless motions, and by trying to use their discovery rights as a technique to raise our costs. What do they hope to obtain? Maybe plaintiffs will lose interest; perhaps the law will change; recollections can become stale. In the meantime, they have the use of any ill-gotten proceeds and plaintiffs have the costs of litigation, (including class notification), the burden of proof, and clearly defined standards to meet at every juncture.

These factors are the same whether the plaintiff's underlying claim is premised on securities, RICO or antitrust. One of the most candid and incisive analyses of the incentives in this type of litigation was done by the National Commission for the Review of Antitrust Laws and Procedures, on which several distinguished members of this Committee worked. The Commission concluded, correctly, that parties to antitrust litigation "may view the litigation as all-out economic war" and that "[p]arties, particularly defendants, often have little or no incentive to expedite litigation; some defendants have economic incentives to delay. Defendants, especially those with fairly clear liability exposure, can garner considerable financial benefit by protracting litigation . . . .. "[3]

Who has the upper hand in the all-out economic war? A 1989 Louis Harris survey of judges and lawyers shows that 60% of judges and 58% of defense lawyers believe that individuals and small businesses are disadvantaged and that a majority of every group of participants in the litigation process agreed with that view.

Defendants have several procedural opportunities to terminate weak RICO claims before trial. The Federal Rules of Civil Procedure provide that a defendant can gain dismissal for lack of personal jurisdiction, for improper service, because the plaintiff did not state a RICO fraud with particularity in his complaint, or because the defendant is entitled to judgment on the pleadings. The defendant can obtain summary judgment after discovery if the plaintiff failed to adduce evidence in discovery on a material fact, among other reasons. Meritless RICO cases are, and should be, dismissed on these grounds.

Just as it is clear that defendants have the economic and legal tools to protect themselves, it is clear that there is no such thing as a free lawsuit. Either the plaintiff, his lawyer, or a combination of the two must bear the expense of litigation as it proceeds. My firm has literally sunk millions of dollars in expenses and time into a case before receiving any recovery. Filing a complex case blithely not only risks severe sanctions, but is economically nonsensical. In light of these risks, treble damages for proof of a RICO offense was, and is, just and necessary.

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[3] Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures 2, 80 (1979).

III.

How Could Congress Reform Civil RICO to Limit Any Perceived Abuses While Retaining its Value to Victims of White Collar Crime?

I do not believe proponents have made the case for curtailing civil RICO. However, if Congress nevertheless chooses to act, there are several changes it could make that would be genuine reforms but would not harm the essential beneficial purposes of the statute.

* Change the Terminology. I believe that criminals who misuse established organizations are "organized criminals" no less than LCN, but clearly much of the emotional appeal for changing the law comes from the name "racketeer" and other similar terms. That problem could be abated by changing in private suits the term "pattern of racketeering activity" to "pattern of unlawful activity."

* Create a Business Dispute Exception to Trebling. For the reasons I have set forth above, I think treble damages is appropriate in most commercial fraud contexts. If you are concerned about possible inclusion of ordinary business-to-business suits within civil RICO (as, for example, when one business sells

a defective machine to another through allegedly fraudulent mail or telephone representations), then "detreble" these suits.

This approach is far preferable to the general approach of S. 438, which broadly discriminates among classes of plaintiffs (making classes all but impossible to define); provides for bi- and tri-furcated proceedings as well as differing and in some cases all but impossible proof standards; and contains specific exemptions for commodities and securities transactions.[4]

* Limit Specific Non-commercial Uses of the Statute. Experience shows that some relationships are so fraught with emotion that the parties will occasionally use any available weapon to hurt their opponent, no matter how ill-conceived and no matter what the damage to themselves. Many of the alleged abuses of civil RICO in divorce cases, inheritance disputes, labor disputes, and religious and social contexts have the flavor of controversies over deeply-held fundamental personal and social convictions. In these

contexts, RICO may be used for vexatious reasons. If Congress finds that to be the case, then it could provide specific exclusions.

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[4] The commodities and securities exemptions are themselves ambiguous and troublesome from several perspectives. In essence, they would reflect a policy judgment that participants in these industries could never be subject to RICO treble damages in private cases unless there were a prior criminal conviction. These exemptions are based on the assertion that there are other regulatory schemes which cover civil commodities and securities offenses. However, these other schemes do not cover repetitive acts under the guise of an enterprise. Also, the argument proves too much. Logically, according to that reasoning, one should withdraw commodities and securities offenses from criminal RICO as well as private civil RICO. Also, according to that reasoning, one should withdraw from civil RICO other industries and organizations that have a comprehensive regulatory scheme, such as banking, airlines, steamship operators, railroads and operators of communications companies. Yet, for some reason, only commodities and securities violations have been targeted for evisceration from private civil RICO.

- Create Concurrent State Court Jurisdiction. If Congress wishes to ease whatever burden on federal courts civil RICO cases cause, it could provide for concurrent state court jurisdiction without removal to the federal court. This approach has worked with the Securities Act of 1933 for over 50 years.

- Enhance the Verification and Particularity Requirements. If Congress were to take such a step, it would send a message to the federal courts to scrutinize RICO claims carefully. Any such requirements should be bilateral, applying to both plaintiffs and defendants.

- Make any changes prospectively. Any case for applicability to pending cases is extremely weak. All of the proposed bills represent major changes in existing legislation enacted by Congress. Victims and lawyers have relied on this legislation in filing cases, choosing forums, rejecting settlements, and formulating litigation strategy. It is unfair to pull the rug out from under lawyers and clients who have directly relied upon the word of Congress.

* * *

Thank you for the opportunity to testify. I would be happy to work with you as you continue your deliberations.

TRANSIT CASUALTY COMPANY
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June 26, 1989

The Honorable Dennis DeConcini
Senate Judiciary Committee
Room 328 Senator Hart Office Building
Washington, D.C. 20510-0302

Attn: Mr. Edward H. Baxter

Re: S438 RICO Reform Legislation

Dear Senator DeConcini:

As Special Deputy Receiver for Transit Casualty Company in Receivership, I am responsible for handling the insolvency of this property casualty company in which claims are ultimately expected to exceed $2 billion. This insolvency is probably the largest in U.S. history involving a property and casualty company.

I heretofore testified at length before the U.S. House of Representatives Subcommittee on Oversight and Investigations of the House Energy and Commerce Committee on April 5 and 11, 1989, and attached hereto is Exhibit A from my testimony indicating losses which have thus far been incurred by the State Guaranty Funds in 49 states and the District of Columbia aggregating $362,374,000. These losses increase weekly.

The ultimate bearer of Transit's insolvency losses, unless sufficient monies are recovered through litigation, are (1) the policyholder claimants and general creditors, and and (2) the Casualty Insurance Consumers and/or citizens of the various fifty states. This loss net of reinsurance in Transit could amount to $1.5 billion.

The Receivership has heretofore filed and concluded through settlement an action which included RICO claims and intends to file additional RICO actions. It is extremely important to this Receivership that it continue to have available the treble damage features of the present RICO statute. This is important because Transit did business in all 50 states and 30 foreign countries; in addition, there are multiple persons, corporations, and entities involved. Transit's resources are such that RICO actions may be our only practical legal remedy for recovery of substantial amounts for the benefit of the many persons who have suffered losses because of the Transit failure.

As the hearings of the Subcommittee on Oversight and Investigations of the House Energy and Commerce Committee will reflect, prevailing practice in the property and casualty industry involves numerous layers of reinsurance. In the instance of Transit Casualty, as well as several other property casualty insolvencies, those Reinsurers included various offshore shell companies which have proved to have no assets. Thus, it is important to have the treble damage feature available for use against those remaining participants in various schemes which may still have assets in order to maximize the recovery for the victims of these insolvencies, although it is doubtful that even treble damages will allow full recovery.

I have reviewed the statement of North Carolina Insurance Commissioner, James Long, on behalf of the National Association of Insurance Commissioners. I strongly and fully support its opposition to the proposed RICO legislation in its present form. I would also urge the Committee to include in the list of RICO offenses, the violation of state insurance laws. This is particularly important since the insurance industry presently is not Federally regulated and pursuit of legal remedies by the Receivership in the fifty states without the aid of a RICO action would necessarily result in a multiplicity of actions unduly expensive for all concerned.

It is ironic that Judiciary Committee RICO "reform" would allow state "regulatory action, approval or interpretation of law" as an affirmative defense at the same time that House Oversight hearings indicate that state regulation of the insurance, as well as the Savings and Loan industry, is ineffectual. If the changes proposed for RICO are incorporated into law, state insurance regulation will be even more ineffectual.

I strongly urge in fairness to policyholders, consumers, creditors, and the citizens of the various states who will feel the impact of the "financial sting" of Transit's insolvency that further hearings be held on this matter and that I be allowed to testify on behalf of Transit Casualty Company in Receivership.

Very truly yours,

S. Burleigh Arnold
Special Deputy Receiver

jc008.615

EXHIBIT 1
TRANSIT CASUALTY COMPANY
Losses Incurred by State Guaranty Funds

STATE	PAIDS	RESERVES	TOTAL INCURRED
Alabama	807,000	1,813,000	2,620,000
Alaska	329,000	1,999,000	2,328,000
Arizona	1,026,000	807,000	1,833,000
Arkansas	1,287,000	244,000	1,531,000
California	27,903,000	20,404,000	48,307,000
COLORADO	901,000	482,000	1,383,000
Connecticut	4,334,000	59,303,000	63,637,000
Delaware	351,000	26,000	377,000
D.C. Washington	430,000	1,636,000	2,066,000
FLORIDA	1,674,000	7,056,000	8,730,000
Georgia	1,409,000	5,238,000	6,647,000
Hawaii	1,796,000	848,000	2,644,000
Idaho	709,000	87,000	796,000
Illinois	6,848,000	4,690,000	11,538,000
INDIANA	280,000	630,000	910,000
Iowa	568,000	829,000	1,397,000
KANSAS	440,000	802,000	1,242,000
Kentucky	711,000	924,000	1,635,000
Louisiana	2,805,000	10,592,000	13,397,000
Maine	525,000	433,000	958,000
Maryland	8,111,000	14,213,000	22,324,000
Massachusets	3,078,000	3,423,000	6,501,000
MICHIGAN	25,227,000	15,933,000	41,160,000
MINNESOTA	3,465,000	1,658,000	5,123,000
Mississippi	1,736,000	357,000	2,093,000
Missouri	1,670,000	1,087,000	2,757,000
Montana	725,000	130,000	855,000
Nebraska	9,565,000	110,000	9,675,000
Nevada	678,000	496,000	1,174,000
New Hampshire	2,083,000		2,083,000
New Jersey	13,993,000		13,993,000
New Mexico	1,050,000	324,000	1,374,000
NEW YORK		9,751,000	9,751,000
North Carolina	1,050,000	324,000	1,374,000
North Dakota	6,000	18,000	24,000
OHIO	12,153,000	2,441,000	14,594,000
Oklahoma	1,632,000	984,000	2,616,000
OREGON	2,234,000	1,513,000	3,747,000
PENNSYLVANIA	12,197,000	12,607,000	24,804,000
Rhode Island	980,000	2,044,000	3,024,000
South Carolina	577,000	207,000	784,000
South Dakota	100,000		100,000
TENNESSEE	984,000	1,548,000	2,532,000
Texas	3,671,000	5,439,000	9,110,000
Utah	52,000	1,196,000	1,248,000
Vermont	731,000	691,000	1,422,000
VIRGINIA	1,600,000	1,244,000	2,844,000
Washington			0
West Virginia	267,000	150,000	417,000
Wisconsin	619,000		619,000
Wyoming	257,000	19,000	276,000
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Total	165,624,000	196,750,000	362,374,000

EXHIBIT 5
TRANSIT CASUALTY COMPANY
Selected Risks Covered by Transit Policies

- Union Carbide (Bhopal, India)
- Johns Manville (Asbestosis)
- A.H. Robins (Dalkon Shield)
- Toxic Waste Sites
- Satellite Launches
- Racehorses
- Medical Malpractice
- Liquor Liability
- Taxi Drivers

EXHIBIT 5 (Continued)
TRANSIT CASUALTY COMPANY
Selected Risks Covered by Transit Policies

Company	Limits of Liability
Raymark	32,000,000
W. R. Grace	89,750,000
GAF Corporation	69,400,000
Colt Industries	51,000,000
John-Crane Houdaille	62,000,000
Foster Wheeler	36,000,000
Genstar	42,375,000
Hercules, Inc.	68,500,000
Libby-Owens-Ford	75,000,000
U. S. Gypsum	45,000,000
Celanese Corporation	80,000,000
International Building Products	14,000,000
I C Industries	50,000,000
PPG Industries	86,000,000
Abbott Laboratories	37,000,000
American Hospital Supply Corporation	94,000,000
Baxter Travenol Laboratories, Inc.	86,000,000
Beecham, Inc.	75,750,000
Berlex Laboratories, Inc.	12,500,000
Boehringer Ingelheim, Ltd.	10,000,000
Boots Pharmaceuticals, Inc.	15,000,000
Bristol-Myers Company	105,250,000
Burroughs Wellcome Company	105,000,000
C. R. Bard, Inc.	4,000,000
CDC Life Sciences/Connaught Laboratories	47,000,000
Cetus Corporation	12,000,000
Ceva Laboratories, Inc.	20,000,000
Chemed Corporation	12,000,000
Cooper Laboratories, Inc.	20,240,000
Cutter Laboratories, Inc.	19,000,000
Economics Laboratory, Inc.	60,000,000
Eli Lilly & Company	86,625,000
Fison, Ltd.	53,746,666
G. D. Searle & Company	114,100,000
Great Lakes Biochemical Company	10,000,000
Hoffman-LaRoche, Inc.	85,400,000
Johnson & Johnson	57,100,000
Key Pharmaceuticals, Inc.	15,000,000
Merck & Company, Inc.	90,000,000
Miles Laboratories, Inc.	18,000,000
Pfizer Genetics, Inc.	20,000,000
Subtotal	2,085,736,666

EXHIBIT 5 (Continued)
TRANSIT CASUALTY COMPANY
Selected Risks Covered by Transit Policies

Company	Limits of Liability
Pfizer, Inc.	135,000,000
Pioneer Pharmaceuticals, Inc.	5,000,000
Proctor & Gamble	65,000,000
Purdue Frederick Company	35,000,000
Revco D S, Inc.	115,000,000
Richardson-Merrell	21,000,000
Richardson-Vicks, Inc.	21,000,000
Rorer Group, Inc.	67,000,000
Rowell Laboratories, Inc.	14,000,000
Sandoz United States, Inc.	39,000,000
Squibb Corporation	41,542,500
Sterling Drug	52,300,000
Syntex, Inc.	98,775,000
Tampax, Inc.	10,000,000
Tyco Laboratories, Inc.	5,000,000
Upjohn Company	74,000,000
American Cyanamid Company	42,000,000
BFC Chemicals, Inc.	19,160,000
Diamond Shamrock Company	11,000,000
Dow Chemical	25,000,000
Engelhard Minerals & Chemicals Corp.	30,000,000
Essex Chemical Corporation	80,000,000
FBC Chemical Corporation	11,000,000
Glyco Chemicals, Inc.	10,000,000
Great Lakes Chemical Corporation	10,000,000
Imperial Chemical Industries	75,500,000
International Minerals and Chemical Corp.	45,000,000
Jones Chemicals, Inc.	5,000,000
Mississippi Chemical Corporation	50,000,000
Monsanto Company	68,375,000
Montrose Chemical Corporation of America	36,000,000
Mt. Pleasant Chemical Company	15,000,000
National Distillers & Chemical Corporation	57,500,000
Union Carbide Corporation	65,000,000
General Motors	83,000,000
American Motors Corporation	45,000,000
Chrysler Corporation	23,000,000
Boeing Company	65,000,000
General Electric	72,000,000
Goodyear Tire and Rubber	85,000,000
American Honda Motor Company	3,000,000
Grand Total	3,915,889,166

U.S. Chamber of Commerce

1615 H Street, N.W.
Washington, D.C. 20062
202/463-5602

Albert D. Bourland
Vice President
Congressional Relations

June 26, 1989

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The U.S. Chamber of Commerce, the world's largest federation of businesses, chambers of commerce and trade and professional associations, offers its views on S. 438, the Racketeer Influenced and Corrupt Organizations (RICO) Reform Act of 1989.

S. 438 should be reported favorably by the Committee on the Judiciary and passed by the full Senate as expeditiously as possible. The unanimous vote in the Committee last year on a nearly identical bill, S. 1523, is indicative of its broad support, its fair treatment of all interests involved and its strong law enforcement provisions. The Chamber urges your support of enactment of this legislation in the current session of Congress.

Not only would the proposed RICO reform legislation ameliorate the unintended civil litigation arising from the RICO statute, but also from a law enforcement perspective, it would make the statute much stronger in the area in which it was intended to be used. For example, S. 438 broadens the RICO statute by providing for international service of process, recovery of damages for bodily injury arising from crimes of violence, exclusive federal jurisdiction, survivability of a RICO claim following the death of a defendant and the addition of new RICO predicate offenses to strengthen the fight against organized crime, terrorism and the international trafficking of drugs.

While removing some of the inappropriate incentives to bring a civil RICO lawsuit of automatic recovery of treble damages and attorneys' fees, S. 438 retains the provision that provides a multiple damage remedy to natural persons victimized by consumer fraud. To further strengthen the fraud aspects of RICO reform, the bill includes the provision whereby natural persons and specified other plaintiff classes (certain tax-exempt organizations, pension funds, investment companies and indenture trustees) harmed by insider trading could recover actual damages, punitive damages (up to two times actual damages), attorneys' fees and costs.

The need for civil RICO reform is clear. Recent Congressional hearings, court decisions and studies by the Department of Justice have demonstrated beyond doubt that civil RICO enforcement is flawed severely in two fundamental respects.

First, civil RICO suits have not achieved their intended purpose of attacking organized crime. In the first years after RICO's enactment, the civil treble damage action was used rarely. However, in the last ten years, use of this action has grown tremendously. A recent American Bar Association "Civil RICO Task Force" report indicates that only nine percent of all civil RICO cases reported involved allegations of criminal activity typical of organized crime.

Second, civil RICO actions are brought almost exclusively against legitimate businesses--contrary to Congressional intent. Section 1964(c) of the RICO law permits virtually any legitimate business enterprise to be charged in a civil RICO action with "racketeering" and to be threatened with a judgment for treble damages and attorneys' fees arising out of an otherwise ordinary commercial dispute. Accusing a reputation-sensitive business of racketeering is far more newsworthy than accusing that same business of breach of contract. The adverse publicity is often more injurious than any monetary liability ultimately incurred. Simply stated, the threat of civil RICO litigation has led to and continues to lead to the settlement of many unmeritorious cases.

S. 438 would ensure that RICO remains a potent weapon in the fight against organized crime, while providing a civil remedy to those injured by racketeering activity. Additionally, S. 438 would disallow the continued use of civil RICO actions as a weapon to harass and threaten legitimate businesses.

The Chamber appreciates this opportunity to present its views on S. 438 and requests that its remarks concerning S. 438 be made part of the hearing record.

Sincerely,

A D Bourland

Albert D. Bourland

cc: Members of the Committee on the Judiciary
Diana Huffman, Majority Staff Director
R. J. Duke Short, Minority Staff Director

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Immediate Past President
Robert Abrams
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August 14, 1989

Senator Dennis DeConcini
328 Hart Office Building
Washington, D.C. 20510-0302

Dear Senator DeConcini:

Enclosed is a revised copy of the Civil Rico Resolution adopted during the Summer Meeting of the National Association of Attorneys General. The resolution was originally transmitted to your office with a letter from our Executive Director, Christine Milliken, on August 2. Since that time, two states, Georgia and New Mexico, have requested that their views be recorded.

We would appreciate your including this copy of our resolution in the public record.

Sincerely,

Lynne Ross

Lynne Ross
Deputy Director and
Legislative Director

cc: Attorney General Bob Corbin
Chair, Civil RICO Subcommittee

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Adopted

Summer Meeting
July 9-12, 1989
Lake of the Ozarks, Missouri

VII

RESOLUTION

CIVIL RICO

WHEREAS, enterprise crime and sophisticated schemes to defraud public and private victims have a multi-billion dollar annual impact in damages and lost revenues to private commerce as well as to local, state, and federal governments; and

WHEREAS, Congress enacted in 1970, the Racketeer Influenced and Corrupt Organization (RICO) provisions, Title IX of the Organized Crime Control Act, which applies to patterns of racketeering activity involving personal violence, provision of illegal goods and services, corruption in private or public life, and various forms of fraud, and also provides important criminal and civil sanctions to protect victims of patterns of racketeering activity, including criminal forfeiture of proceeds of racketeering activity; criminal forfeiture of interests in enterprises; equitable relief for the government; equitable relief for victims of racketeering activity; and treble damages, costs, and attorney's fees for victims of racketeering activity; and

WHEREAS, since 1972, a majority of states have enacted legislation patterned after Title IX as an effective and essential means of redressing wrongs, and additional states are actively considering the passage of such legislation; and

WHEREAS, the 99th, 100th and 101st sessions of Congress have engaged in debate over proposed amendments which would repeal or weaken key provisions of Title IX; and

WHEREAS, the National Association of Attorneys General has consistently opposed attempts to repeal or weaken the provisions of Title IX, including efforts to enact retroactive rules limiting the recovery of damages in pending RICO civil litigation, amendments which would exempt specific businesses from the threat of RICO liability, and provisions to weaken the incentive of treble damage awards for racketeering conduct; and

WHEREAS, the National District Attorneys Association, the North American Securities Administrators Association, the National Conference of State Legislatures, the National Association of Insurance Commissioners, and consumer organizations have supported the efforts of the National Association of Attorneys General in opposing these amendments; and

WHEREAS, the Attorneys General recognize the need to both strengthen the statute while at the same time protect against its abuse;

NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:

1. Endorses in principle the following additions which would strengthen the federal RICO statute:

- to allow both victims and the government to obtain pre-judgement restraint of assets

- to allow both the government and victims to obtain equity relief
- to allow *parens patriae* suits by Attorneys General to use federal RICO to remedy economic damage to the state
- to provide new predicate offensives to RICO including all of the appropriate federal crimes against fraud and crimes of violence, crimes against the environment, crimes involving public corruption and the illegal provision of goods and services
- to allow concurrent jurisdiction in state courts;

2. Endorses in principle the following provisions designed to protect against abuse, which would:

- protect legitimate first amendment interests
- allow the court to waive counsel fees in appropriate cases of economic disparity between the parties
- provide a definition which would limit enterprise liability to those cases where an officer, director, or high managerial agent authorized or recklessly tolerated the prohibited conduct
- provide notice to the government of any private civil RICO action and an ability for the government to intervene
- set a statutory requirement that all pleadings be verified
- codify the requirements of Rule 9 of the Federal Rules of Civil Procedure
- codify the requirements of Rule 11 of the Federal Rules of Civil Procedure coupled with a specific proceeding which would allow a party to raise a Rule 11 issue;

3. Authorizes the Civil RICO Subcommittee chaired by Attorney General Corbin to draft legislation embodying these principles and to provide it to the Congress; and

4. Authorizes the Executive Director and General Counsel to transmit these views to the Administration, to the appropriate members of Congress, and to interested associations and individuals.

Abstentions:	Virginia Georgia
Dissent:	New Mexico

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